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NORTH CAROLINA REPORTS

VOL. 169

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

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SPRING TERM, 1915
(IN PART)
FALL TERM, 1915
(IN PART)

BY
ROBERT C. STRONG
STATE REPORTER

RALEIGH, N. C.
EDWARDS & BROUGHTON PRINTING CO.
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5 Iredell Equity	"	40 "
6 Iredell Equity	"	41 "
7 Iredell Equity	"	42 "
8 Iredell Equity	"	43 "
Busbee Law	"	44 "
Busbee Equity	"	45 "
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2 Jones Law	"	47 "
3 Jones Law	"	48 "
4 Jones Law	"	49 "
5 Jones Law	"	50 "
6 Jones Law	"	51 "
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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

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GEORGE H. BROWN,
WILLIAM A. HOKE,
WILLIAM R. ALLEN.

ATTORNEY-GENERAL:

T. W. BICKETT.

ASSISTANT ATTORNEY-GENERAL:

T. H. CALVERT.

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

W. M. Bond	First	Chowan.
George W. Connor	Second	Wilson.
R. B. Peebles	Third	Northampton.
F. A. Daniels	Fourth	Wayne.
H. W. Whedbee	Fifth	Pitt.
O. H. Allen	Sixth	Lenoir.
C. M. Cooke	Seventh	Franklin.
W. P. Stacy	Eighth	New Hanover.
C. C. Lyon	Ninth	Bladen.
W. A. Devin	Tenth	Granville.

WESTERN DIVISION

H. P. Lane	Eleventh	Rockingham.
Thomas J. Shaw	Twelfth	Guilford.
W. J. Adams	Thirteenth	Moore.
W. F. Harding	Fourteenth	Mecklenburg.
B. F. Long	Fifteenth	Iredell.
J. L. Webb	Sixteenth	Cleveland.
E. B. Cline	Seventeenth	Catawba.
M. H. Justice	Eighteenth	Rutherford.
Frank Carter	Nineteenth	Buncombe.
G. S. Ferguson	Twentieth	Haywood.

SOLICITORS

EASTERN DIVISION

J. C. B. Ehringhaus	First	Pasquotank.
Richard G. Allsbrook	Second	Edgecombe.
John H. Kerr	Third	Warren.
Walter D. Siler	Fourth	Chatham.
Charles L. Abernethy	Fifth	Carteret.
H. E. Shaw	Sixth	Lenoir.
H. E. Norris	Seventh	Wake.
H. H. Lyon	Eighth	Columbus.
S. B. McLean	Ninth	Robeson.
S. M. Gattis	Tenth	Orange.

WESTERN DIVISION

S. P. Graves	Eleventh	Surry.
John C. Bower	Twelfth	Davidson.
W. E. Brock	Thirteenth	Anson.
G. W. Wilson	Fourteenth	Gaston.
H. Clement	Fifteenth	Rowan.
Thomas M. Newland	Sixteenth	Caldwell.
J. J. Hayes	Seventeenth	Wilkes.
Michael Schenck	Eighteenth	Henderson.
J. E. Swain	Nineteenth	Buncombe.
G. L. Jones	Twentieth	Macon.

ATTORNEYS LICENSED BY SUPREME COURT

FALL TERM, 1915

Name.	*County.*
Abbott, Peyton B.	Forsyth.
Allison, William H. J.	Transylvania.
Arledge, Allen G.	Polk.
Bender, Robert P.	Jones.
Berry, Margaret K.	Orange.
Bowers, Valentine B.	Avery.
Briggs, Willis G.	Wake.
Busby, John C.	Rowan.
Caldwell, Joseph Y.	Iredell.
Cansler, John S.	Mecklenburg.
Carpenter, Commie J.	Wake.
Chambers, Walter R.	Buncombe.
Clark, Hector H.	Bladen.
Coley, McDaniel	Wayne.
Creech, Fulton H.	Johnston.
Davis, Edward P.	Mecklenburg.
Davis, Jedith R.	Durham.
Dees, Julius G.	Pamlico.
Denny, Robert E.	Guilford.
Dickson, Rufus DeV.	Hoke.
Didlake, Thos. E.	Shackelfords, Va.
Dolly, Stephen B.	Guilford.
Downing, William C.	Cumberland.
Dozier, Riley C.	Camden.
Duncan, William B., Jr.	Wake.
Ferree, Idyl Arris	Randolph.
Fuller, David H.	Robeson.
Graham, Augustus W., Jr.	Granville.
Hamilton, Luther	Carteret.
Harrington, Henry G.	Bertie.
Harris, Nathaniel C.	Rutherford.
Hart, Julian G.	Forsyth.
Hornik, Adolph R.	Charleston, S. C.
Hummell, Leslie R.	New Hanover.
Jerome, Edward C.	Guilford.
Johnson, Julius	Caswell.
Jones, Gilmer A.	Macon.
Joyner, William T.	Wake.
King, James C.	New Hanover.
Kirkman, Don. R.	Guilford.
Lee, James G.	Person.
Levinson, Louis L.	Johnston.
Limerick, Thos. F.	South Carolina.
Lynch, William E.	Rowan.
Mac, Johnson, Doctor	Robeson.
McCubbins, Benj. D.	Rowan.
Marrow, Henry B.	Orange.
Mebane, Banks H.	Guilford.
Moore, William P.	Burke.
Mordecai, William G.	Durham.

Name.	*County.*
Mull, John P.	Cleveland.
Pegg, Hubert D.	Guilford.
Pittman, Kenneth A.	Franklin.
Pou, George R.	Johnston.
Powell, Wilson A.	Norfolk, Va.
Pruitt, Thos. P.	Catawba.
Raper, Paul R.	Davidson.
Ratcliff, Hubert McR.	Anson.
Scott, Luther V.	Yadkin.
Shell, Otis P.	Harnett.
Slawter, John D.	Forsyth.
Sloan, Ralph S.	Duplin.
Smith, Major T.	Rockingham.
Strole, Glenn F.	Columbus.
Stroup, Rush	Cleveland.
Stubbs, Harry M.	Martin.
Taylor, William W.	Warren.
Valentine, Itinneus T.	Nash.
Vinson, Barnard Bee.	Warren.
Walker, Daniel J.	Alamance.
Warlick, Geo. A., Jr.	Catawba.
Wellons, Benjamin F.	Johnston.
West, Edgar C.	Sampson.
Whitaker, Romulus A., Jr.	Lenoir.
Whiting, Semour W.	Wake.
Whitley, Wilford L.	Beaufort.
Williams, Orville L.	Hyde.
Wilson, Robert T.	Caswell.
Winborne, Robert W.	Roanoke, Va.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE SPRING OF 1916

SUPREME COURT

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August in every year. The examination for applicants for license to practice law, to be conducted in writing, takes place on the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

First District	Feb. 8
Second District	Feb. 15
Third and Fourth Districts	Feb. 22
Fifth District	Feb. 29
Sixth District	Mar. 7
Seventh District	Mar. 14
Eighth and Ninth Districts	Mar. 21
Tenth District	Mar. 28
Eleventh District	Apr. 4
Twelfth District	Apr. 11
Thirteenth District	Apr. 18
Fourteenth District	Apr. 25
Fifteenth and Sixteenth Districts	May 2
Seventeenth and Eighteenth Districts	May 9
Nineteenth District	May 16
Twentieth District	May 23

SUPERIOR COURTS, SPRING TERM, 1916

The parenthesis numeral following the date of a term indicates the number of weeks during which the court may hold.

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

SPRING TERM, 1916—*Judge Allen.*
Pasquotank—Jan. 3† (2); Feb. 14† (1); Mar. 20 (1).
Camden—Mar. 13 (1).
Gates—Mar. 27 (1).
Washington—Jan. 17 (1); June 5 (2).
Perquimans—Jan. 24 (1); Apr. 17 (1).
Currituck—Jan. 31† (1); Mar. 6 (1).
Chowan—Apr. 3 (1).
Beaufort—Feb. 21† (2); Apr. 10† (1); May 8 (2).
Hyde—May 22 (1).
Dare—May 29 (1).
Tyrrell—Apr. 24 (1); May 1† (1).

SECOND JUDICIAL DISTRICT

SPRING TERM, 1916—*Judge Cooke.*
Nash—Jan. 24 (1); Feb. 28† (1); Mar. 13 (1); May 1* (1); May 8† (1); May 29† (1).
Wilson—Jan. 17 (1); Feb. 7 (1); Feb. 14† (1); May 15 (1); June 26† (1).
Edgecombe—Mar. 6 (1); Apr. 3† (2); June 5 (2).
Martin—Mar. 20 (2); June 19 (1).

THIRD JUDICIAL DISTRICT

SPRING TERM, 1916—*Judge Rountree.*
Northampton—Apr. 3 (2).
Halifax—Jan. 31 (2); Mar. 20 (2); June 5 (2).
Bertie—Feb. 14 (1); May 8 (1).
Warren—Jan. 17 (2); June 19 (2).
Vance—Mar. 6 (2); May 22 (2).
Hertford—Feb. 28 (1); Apr. 17 (2).

FOURTH JUDICIAL DISTRICT

SPRING TERM, 1916—*Judge Lyon.*
Lee—Mar. 27 (2); May 8† (1).
Chatham—Jan. 17 (1); Mar. 20† (1); May 15 (1).
Johnston—Feb. 21† (2); Mar. 13† (1); Apr. 24† (1).
Wayne—Jan. 24 (2); Apr. 10† (2); May 29 (2).
Harnett—Jan. 10 (1); Feb. 7† (2); May 22 (1).

FIFTH JUDICIAL DISTRICT

SPRING TERM, 1916—*Judge Devin.*
Jones—Apr. 3 (1).
Pitt—Jan. 17† (1); Jan. 24* (1); Mar. 20 (2); Apr. 17† (1); Apr. 24* (1); May 22† (1).
Craven—Jan. 10* (1); Feb. 7† (2); Apr. 10‡ (1); May 15† (1); May 29† (1); June 5* (1).
Carteret—Mar. 13 (1); June 12 (2).
Pamlico—May 1 (2).
Greene—Feb. 28 (2); June 26 (1).

SIXTH JUDICIAL DISTRICT

SPRING TERM, 1916—*Judge Bond.*
Onslow—Mar. 6 (1); Apr. 17† (2).
Duplin—Jan. 10† (2); Jan. 31* (1); Mar. 27† (2).
Sampson—Feb. 7 (2); Mar. 13† (2); May 1 (2).
Lenoir—Jan. 24* (1); Feb. 21† (2); Apr. 10 (1); May 22* (1); June 12† (2).

SEVENTH JUDICIAL DISTRICT

SPRING TERM, 1916—*Judge Connor.*
Wake—Jan. 10* (1); Jan. 31† (1); Feb. 7* (1); Mar. 6* (1); Mar. 13† (4); Apr. 10* (1); Apr. 17† (3); May 8* (1); May 22† (1); June 5* (1); June 12† (3).
Franklin—Jan. 17* (2); Feb. 21† (2); May 15 (1).

EIGHTH JUDICIAL DISTRICT

SPRING TERM, 1916—*Judge Peebles.*
Brunswick—Mar. 20 (1).
Columbus—Jan. 31 (1); Feb. 21† (2); Apr. 24 (2).
New Hanover—Jan. 17* (1); Feb. 7† (2); Apr. 3* (1); Apr. 10† (2); May 8 (1); May 22† (2); June 26* (1).
Pender—Jan. 24 (1); Mar. 6† (2); June 5 (1).

NINTH JUDICIAL DISTRICT

SPRING TERM, 1916—*Judge Daniels.*
Robeson—Jan. 31* (1); Feb. 7† (1); Feb. 28† (2); Apr. 3† (2); May 15* (2).
Bladen—Jan. 10‡ (1); Mar. 13* (1); Apr. 24† (1).
Hoke—Jan. 24 (1); Apr. 17† (1); June 12 (1).
Cumberland—Jan. 17* (1); Feb. 14† (2); Mar. 20† (2); May 1† (2); May 29* (1).

TENTH JUDICIAL DISTRICT

SPRING TERM, 1916—*Judge Whedbee.*
Granville—Feb. 14 (2); Apr. 10 (2).
Person—Feb. 7 (1); Apr. 24 (1).
Alamance—Jan. 24† (1); Mar. 6* (1); May 29† (2).
Durham—Jan. 10† (2); Feb. 28* (1); Mar. 13† (2); May 1† (1); May 22* (1); June 19† (1).
Orange—Mar. 27 (1); May 8† (1).

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

SPRING TERM, 1916—*Judge Webb.*
Ashe—Apr. 10 (2).
Forsyth—Jan. 10 (2); Feb. 14† (2); Mar. 13† (2); Mar. 27* (1); May 22† (2).
Rockingham—Jan. 24* (1); Feb. 28† (2); May 15 (1); June 19† (2).
Caswell—Apr. 3 (1).
Surry—Feb. 7 (1); Apr. 24 (2).
Alleghany—May 8 (1).

TWELFTH JUDICIAL DISTRICT

SPRING TERM, 1916—*Judge Cline.*
Davidson—Feb. 28 (2); May 8† (1); May 29 (2).
Guilford—Jan. 17† (2); Jan. 31* (1); Feb. 14 (2); Mar. 13† (3); Apr. 17† (2); May 1* (1); May 15† (2); June 12† (1); June 19* (1).
Stokes—Apr. 3* (1); Apr. 10† (1).

THIRTEENTH JUDICIAL DISTRICT

SPRING TERM, 1916—*Judge Justice.*
Moore—Jan. 24* (1); Feb. 14† (1); May 22† (1).
Stanly—Feb. 7† (1); Apr. 3 (1); May 15† (1).
Richmond—Jan. 10* (1); Mar. 27† (1); Apr. 10* (1); May 29† (1); June 19† (1).
Union—Jan. 31* (1); Feb. 21† (2); Mar. 20* (1); May 8† (1).
Anson—Jan. 17* (1); Mar. 6† (1); Apr. 17 (1); Apr. 24† (1); June 12† (1).
Scotland—Mar. 13† (1); May 1* (1); June 5 (1).

FOURTEENTH JUDICIAL DISTRICT

SPRING TERM, 1916—*Judge Carter.*
Mecklenburg—Jan. 10* (2); Feb. 7† (2); Feb. 21* (1); Feb. 28† (3); Mar. 27* (1); Apr. 3† (2); May 1† (2); May 15* (1); May 29† (2); June 12* (1); June 19† (1).
Gaston—Jan. 24 (2); Mar. 20* (1); Apr. 17† (2); May 22* (1).

FIFTEENTH JUDICIAL DISTRICT

SPRING TERM, 1916—*Judge Ferguson.*
Montgomery—Jan. 24* (1); Apr. 17† (1).
Randolph—Mar. 20† (2); Apr. 3* (1).
Iredell—Jan. 31 (2); May 22 (2).
Cabarrus—Jan. 10 (2); Apr. 24 (2).
Davie—Feb. 28 (2).
Rowan—Feb. 14 (2); Mar. 13† (1); May 8 (2).

SIXTEENTH JUDICIAL DISTRICT

SPRING TERM, 1916—*Judge Lane.*
Lincoln—Jan. 31 (1).
Cleveland—Jan. 17 (2); Mar. 27 (2).
Burke—Mar. 13 (2).
Caldwell—Feb. 28 (2); May 22† (2).
Polk—Apr. 17 (2).

SEVENTEENTH JUDICIAL DISTRICT

SPRING TERM, 1916—*Judge Shaw.*
Catawba—Feb. 7 (2); May 8† (2).
Mitchell—Apr. 10 (2).
Wilkes—Jan. 24† (2); Mar. 13 (2).
Yadkin—Mar. 6 (1).
Watauga—Mar. 27 (2).
Alexander—Feb. 21 (1).
Avery—Apr. 24 (2).

EIGHTEENTH JUDICIAL DISTRICT

SPRING TERM, 1916—*Judge Adams.*
McDowell—Jan. 24† (2); Feb. 21 (2).
Rutherford—Feb. 7† (2); May 1 (2).
Transylvania—Apr. 17 (2).
Henderson—Jan. 10 (2); Mar. 6* (2); May 29† (2).
Yancey—Mar. 27 (2).

NINETEENTH JUDICIAL DISTRICT

SPRING TERM, 1916—*Judge Harding.*
Buncombe—Jan. 10 (3); Jan. 31† (4); Mar. 6† (3); Apr. 3 (3); May 1† (3); May 29† (4).
Madison—Feb. 28 (1); Mar. 27† (1); Apr. 24† (1); May 22† (1).

TWENTIETH JUDICIAL DISTRICT

SPRING TERM, 1916—*Judge Long.*
Haywood—Jan. 24 (3); May 8† (2).
Swain—Mar. 6 (2).
Cherokee—Jan. 10 (2); Apr. 3 (2).
Macon—Apr. 24 (2).
Graham—Mar. 20 (2).
Clay—Apr. 17 (1).
Jackson—Feb. 21 (2); May 22 (2).

*Criminal cases. †Civil cases. ‡Civil and jail cases.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—HENRY G. CONNOR, Judge, Wilson.

Western District—JAMES E. BOYD, Judge, Greensboro.

EASTERN DISTRICT

Terms.—District terms are held at the time and place, as follows:

Raleigh, fourth Monday after the fourth Monday in April and October. ALEX. L. BLOW, Clerk; LEO. D. HEARTT, Deputy Clerk.

Elizabeth City, second Monday in April and October, HARRY T. GREENLEAF, JR., Deputy Clerk, Elizabeth City.

Washington, third Monday in April and October. ARTHUR MAYO, Deputy Clerk, Washington.

New Bern, fourth Monday in April tnd October. WALTER DUFFY, Deputy Clerk, New Bern.

Wilmington, second Monday after the fourth Monday in April and October. SAMUEL P. COLLIER, Deputy Clerk, Wilmington.

Terms of court for Laurinburg and Wilson are now created, but not definitely fixed.

OFFICERS

F. D. WINSTON, United States District Attorney, Windsor.

E. M. GREENE, Assistant United States District Attorney, New Bern.

W. T. DORTCH, United States Marshal, Raleigh.

ALEX. L. BLOW, Clerk United States District Court at Raleigh for the Eastern District of North Carolina, Raleigh.

LEO. D. HEARTT, Deputy Clerk, Raleigh.

WESTERN DISTRICT

Terms.—District terms are held at the time and place, as follows:

Greensboro, first Monday in June and December. J. M. MILLIKEN, Clerk, Greensboro.

Statesville, third Monday in April and October.

Asheville, first Monday in May and November. W. S. HYAMS, Deputy Clerk, Asheville.

Charlotte, first Monday in April and October.

Salisbury, fourth Monday in April and October.

Wilkesboro, fourth Monday in May and November.

OFFICERS

WILLIAM C. HAMMER, United States District Attorney, Ashboro.

CLYDE R. HOEY, Assistant United States District Attorney, Charlotte.

CHARLES A. WEBB, United States Marshal, Asheville.

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1915

ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY
v. B. P. WAY AND B. W. WAY.

(Filed 22 April, 1915.)

1. Courts—Intimation of Opinion—Instructions—Appeal and Error—Trials.

When the trial judge intimates during the trial of a case that he will peremptorily instruct the jury to answer the controlling issue in favor of a party, upon the evidence, rendering it unavailing for the opposing party to further develop his case, he, in deference to the ruling of the court, may refrain from doing so, and appeal from the judgment accordingly rendered.

2. State's Lands—Entry—Requisites—Navigable Waters—Interpretation of Statutes.

Originally lands covered by navigable waters were not subject to entry, but by the act of 1854-5, ch. 21, this was changed, permitting entries to be made under certain restrictions, giving to incorporated towns the power to "regulate the line of deep water, to which entries may be made," when the riparian lands are situate therein. By Public Laws 1893, ch. 17, the words "to which entries may be made" were changed so as to read "to which wharves may be built." *Held*, the statutes are strictly construed with reference to the conditions under which entries may be made, and the entry does not confer an absolute and unrestricted title, but only an easement for the purposes specified in the statute, Revisal, sec. 1696, or, perhaps, an estate upon condition.

3. Entries of Land Under Navigable Waters—Rights of Riparian Owners and Others Therein.

Lands under navigable waters are not subject to entry except in the manner prescribed by the statute, and in strict conformity therewith, and then only by the riparian owner, not being subject to entry by those having no interest in the banks or shores.

4. State's Lands—Grants—Interpretation of Statutes.

A grant of land covered by navigable waters, as permitted by statute, can have no further effect than the statute allows, and the grant will be construed as if the statute had been written into it. Revisal, sec. 1696.

5. Courts — Intimation of Opinion — Instructions — Appeal and Error — New Trial—Scope of Inquiry—Evidence.

In a proceeding to protest an entry under the provisions of Revisal, sec. 1696, the trial judge erroneously holding that the former entry of the protestant conferred an absolute and indefeasible title to lands under navigable water to the deep-water margin, and judgment having been accordingly rendered and appealed from by the enterer without full development of the case, the judgment will be set aside on appeal, leaving open to the parties to show, if they can do so, other matters affecting the title, which are relevant and available to them.

APPEAL by defendant from *Peebles, J.*, at October Term, 1914, of CARTERET.

Proceeding to protest Entry No. 4463 of a piece of land described as follows: "All that certain part of reclaimed land filled into the sea-wall of Morehead City, lying in the town of Morehead City east of Seventh Street and south of Arendell Street, beginning on Seventh Street at the southwest corner of Lot No. 8 in Square No. 7, and running thence south along what is called Seventh Street on the land of the town of Morehead City to deep-water or harbor line of Bogue Sound, thence east 100 feet, thence north parallel with Seventh Street to the southeast corner of said Lot No. 8 in Square No. 7, thence west along the line of said Lot No. 8 100 feet to the beginning, being the reclaimed land of the former water front of Lot No. 8 in Square No. 7 in the plan of the town of Morehead City, and the water front thereof to deep-water or harbor line."

The court submitted this issue to the jury: "Is the land described in the entry filed in this case vacant land and subject to entry thereof and grant from the State?" The entry of the defendants embraced Lots 6 and 7 in Square No. 7, as shown on the map of Morehead City. It was admitted that on 24 May, 1856, a grant was issued by the State to John M. Morehead and William H. Arendell for "the land lying around Shepherd's Point between high-water mark and the deep water of Bogue Sound, Newport River, and Calico Creek," which covered the land in dispute. This land, covered at that time by the waters of Bogue Sound, was conveyed by John M. Morehead and others, on 2 July, 1857, to the Shepherd's Point Land Company, and the enterer claims to have acquired title by mesne conveyances from that company to Lot No. 8, which lies in Square No. 7, between Lots 6 and 7 and Lots 9 and 10, the last two lots (9 and 10), which are now claimed by the protestant, being, at the time the deed of Morehead and others to the land company was executed, partly covered by the waters of said sound and partly dry

land. The tracks of the protestant are laid in Arendell Street, immediately back and north of Lots 9 and 10, with a sidewalk intervening. Arendell Street is one of the public streets of Morehead City, and protestant has its right of way thereon for its full width. Lots 9 and 10, and Lot 8, and Lots 6 and 7, in the order named, lie south of Arendell Street and the sidewalk, in the direction of Bogue Sound, and at the time of the grant to Morehead and Arendell, and the deed of Morehead and others to the land company, they were covered by its waters at high tide, except a small part of Lots Nos. 9 and 10 on their northern side. At low tide all of Lots 9 and 10, 8, and 6 and 7 were exposed, except a small part at the lower end of Lots 6 and 7. In 1902 Lot No. 8 was filled in with oyster shells, which caused an accretion of the land to form, and a fish and oyster house were built thereon. This was done by A. T. Lavalette, under whom the enterer claimed Lot No. 8, and who held a deed for said lot, and claimed under the land company, and a wharf was constructed from these buildings across Lots 6 and 7 and far enough out for boats to reach the wharf at low tide. Lot No. 8, after it was filled in as described, was above high-water mark with ordinary tides, but would be covered by "an extremely high tide." In 1913 a concrete sea-wall was built in front of these lots and of the town, and the space between it and high land was filled in with dirt and silt from dredgings made by the United States Government in Bogue Sound channel. The land is now above water and is dry land. This sea-wall, built for the purpose of filling in the space back of it to high land, "was paid for by Morehead City and individual owners of property." It is stated in the case that the protestant "bought some parts of Block 7 from the Shepherd Point Land Company and has been in possession of it for ten years, and that all property in Morehead City and adjacent thereto, not otherwise occupied, has been in the possession of the said land company for a great many years." It also appears that after the space between the sea-wall and high land had been filled in, a street was opened, presumably by the city, along and by the side of the wall, known as Evans Street, and Lots 6 and 7 now face on that street. There are 16 lots in Block 7. It is also stated that a grant was issued by the State for "all of this land," covering Lots 6 and 7, to the Shepherd Point Land Company in 1857. The waters of Bogue Sound are navigable.

The court held that, it having been admitted that the grant to Morehead and Arendell covered Lots 6 and 7, which defendant had entered, a second grant of the same land would be void, and the land was not, therefore, the subject of entry; and this being so, he would instruct the jury to answer the issue "No." The defendant, in deference to this ruling of the court, refrained from offering any further testimony or defense. The court then instructed the jury to answer the issue "No,"

if they believed the evidence, and defendant excepted. The jury answered the issue "No." Judgment was entered upon the verdict, and defendant appealed.

Moore & Dunn and J. F. Duncan for plaintiff.
Guion & Guion and E. H. Gorham for defendant.

WALKER, J., after stating the case: The instruction of the court, to which the enterer deferentially submitted and refrained from further developing his case, was erroneous. The deduction from this opinion of the court as to the effect of Grant No. 83 to Morehead and Arendell was necessarily that the protestant was entitled to recover, or to have his protest sustained. If the grant conferred an absolute and unrestricted title to the bed of the sound, the opinion was correct, but in the case of *Shepherd's Point Land Co. v. Atlantic Hotel Co.,* 132 N. C., 517, a construction was put upon this very grant, No. 83, to Morehead and Arendell, and it was held that it conveyed only an easement for the purposes specified in the statute, Code, sec. 2751, which has since been amended; Revisal, sec. 1696. Under Revisal, sec. 1693 (Rev. Code, ch. 42, sec. 1; Acts 1854-5, ch. 21), lands covered by navigable waters were not the subject of entry as other lands; but this was changed by Acts of 1854-5, ch. 21, so that entries were permitted under certain restrictions and only for the purposes indicated. The act provided as follows: "Persons owning lands on any navigable sound, river, creek, or arm of the sea, for the purpose of erecting wharves on the side of the deep waters thereof next to their lands, may make entries of the lands covered by water, adjacent to their own, as far as the deep water of such sound, river, creek, or arm of the sea, and obtain title as in other cases. But persons making such entries shall be confined to straight lines, including only the fronts of their own tracts, and shall in no respect obstruct or impair navigation. When any such entry shall be made in front of the lands in any incorporated town, the town corporation shall regulate the line on deep water, to which entries may be made." By Public Laws 1893, ch. 17, the words "to which entries may be made" were changed so as to read "to which wharves may be built." The right to enter land covered by navigable water, even for the restricted uses and purposes, was, of course, an exception to the established policy of the State, which had existed for many years, and a statute like this, which is special in its nature, should not be carried in meaning beyond a strict construction of its language, and should be confined in its operation to the specified purposes. The right thus to enter land under navigable water was confined to riparian proprietors, the words being: "Persons owning any lands on any navigable sound, river, creek, or arm of the sea" may so

enter land, but for the purpose of erecting wharves on the side of the deep waters thereof, next to their lands, and the entry can extend only to "deep water." They are also confined to straight lines and must not obstruct or impair navigation. It is true, the statute provides that they may thus enter the land covered by navigable water "and obtain title as in other cases," but this means no more than that a grant should issue for the land, and the expression does not carry with it the meaning that the title shall be the same as in other cases where grants are issued for patentable lands. This could not be so, as the statute expressly restricts the nature of the grant and defines the interest or estate thereby conveyed, and as said in *Land Co. v. Hotel Co., supra,* the words of the grant must be considered as if the words of the statute, restricting the use of the land to the purpose of erecting wharves, had been written into it. One object of the grant was to afford foundations for wharves, and it conveyed an easement to use the land for the purpose specified in the statute. It was so held in *Land Co. v. Hotel Co., supra;* and it was further held in that case that the easement was incidental to the ownership of the banks or shores of the body of water, whether river or sound, and was inseparable from the riparian proprietorship. The Court further says: "If the construction contended for by the plaintiff is correct, no purchaser of a town lot fronting on the waters could have erected a wharf, pier, or bath-house, or enjoyed many other privileges incident to his riparian ownership, without the consent of the owners of the navigable waters, and the Shepherd's Point Land Company could now levy tribute upon the commerce, business, and pleasure of the citizens of the town. The right of navigation would be of little value if a corporation, after selling the lots with water fronts, could prevent the building of wharves and enjoying other privileges. If this were the purpose and policy of the Legislature, why restrict the grant to the purpose of 'erecting wharves on the side of deep water thereof next to their lands'? and why restrict the privilege to 'persons owning land on any navigable waters'?" The plaintiff in that case claimed under this very grant, No. 83, which described the land covered by navigable water around Morehead City from high- to low-water mark, or from the shore to the deep-water line. It was held, as we will see, that having lost the ownership of the shore, the rights under the grant passed to the riparian owner, for the Court further said: "We are of the opinion that the grant to Morehead and Arendell of Square 83 operated to give them an exclusive right or easement therein as riparian owners and proprietors to erect wharves, etc.; that when they ceased to be the owners of the land, by conveyance to the Shepherd's Point Land Company, such easement passed as appurtenant thereto, and that it has passed by the several conveyances of the land as appurtenant to Square No. 1; that such easement passed to the

defendant company, and the plaintiff has no such title to the soil under the navigable water as entitles it to maintain this action." The Court cited *Gregory v. Forbes,* 96 N. C., 77, and quoted with approval the language of *Chief Justice Smith* as follows: "The survey, and we assume the entry, which it must follow, declare that it (the land) is for wharf purposes, and this is the only use for which the grant could issue." The case of *Florida v. Phosphate Co.,* 32 Fla., 82, was also cited, and this passage taken from it: "In construing this act, not only are we to keep in view the real nature of the subject-matter, but it is to be judged in the light of the rule applicable to all grants by the Government, which is that they are to be strictly construed or to be taken most beneficially in favor of the State and against the grantee. The plan of the act is that the title of the submerged land should be vested in the riparian owner for these uses and purposes. The State, *for the considerations above mentioned,* divests herself and invests the riparian owner with the title to the land." This Court thus commented upon the extract: "*These considerations* are for the purpose and end that commerce may be benefited by the building of wharves, piers, etc. And the grant in this case is one of the class in which the subject of the grant, as long as it is of that character to be used or built (upon) for the benefit of commerce, is apparent and controlling. The Court held that the right acquired was confined to the purposes set forth in the act." This Court also referred to several cases in which it was held that the use to which the land was to be applied controlled and restricted the estate granted, as in *Robinson v. R. R.,* 59 Vt., 426, where it was held that the grantee acquired only an easement when land was granted for a plank road, and *Flaten v. Morehead,* 51 Minn., 512, when land was conveyed "for use as a public park," where the Court said: "It is not incumbent upon us at this time to determine the precise nature of the estate conveyed by this instrument, whether a new easement was acquired by the village or an estate on condition or in trust. But we are obliged to consider the clause in connection with the remainder of the deed and to give it the effect intended, if that can be discovered and is reconcilable with the main purpose of the parties."

If considered as an easement merely, as decided in *Land Co. v. Hotel Co.,* the interest conveyed by the grant is necessarily incident to the ownership of the shore. It was so held in *Zimmerman v. Robinson,* 114 N. C., 39, where the Court said: "Riparian rights being incident to land abutting on navigable waters, cannot be conveyed without a conveyance of such land, and such lands covered by navigable waters are subject to entry only by the owner of land abutting thereon." This being the conclusion of the Court in the *Land Co. case,* that only an easement passed, it follows that the judge was in error when he intimated

otherwise, and afterwards held that the land itself passed, so that a second grant therefor could not issue. If only an easement passed, the question arises, whether it has been lost or abandoned in any way, and as to what are the rights of the parties in the newly made or reclaimed land. We confess that the present state of the evidence is so uncertain, indefinite, and unintelligible that it would not be safe to pass upon the important matters involved without a full disclosure of the facts, and we might do great injustice to one or the other of the parties by undertaking now to decide them. It may appear more clearly and fully, at the next trial, what is the extent of protestant's right or easement in Arendell Street, and how and when acquired, and what is the status of the sidewalk with reference thereto. Is it included in the right of way or not? And also how and when protestant acquired title to Lots 9 and 10, if it is so owned, and how and when the enterer acquired title to Lot 8, if he has done so, and whether the protestant consented or contributed to the expense of building the wall and of filling in the space behind it with the dredgings from the channel of the sound. Has the enterer acquired title to Lot 8 by adverse possession, or in any other way; and, if so, did it extinguish the protestant's easement in the land formerly covered by water in front of Lots 9 and 10; or how are his rights affected thereby and by the building of the sea-wall and the conversion of that part of the bed of the sound into dry land? These are important questions, which should not be decided without a full knowledge of the facts and upon a mere consideration of the nature of Grant No. 83 to Morehead and Arendell.

As has been done before in like cases, we direct that the verdict and judgment be set aside, in order that the facts may be found, upon proper issues submitted to the jury, or otherwise, as the parties may agree, and that the case may be tried to a definite conclusion upon its real merits.

If the case should return to this Court, it may become necessary to decide more precisely what is the nature of the estate or interest which passed by the grant from the State, but this will depend largely upon the facts then before us, as it may prove to be immaterial upon those facts whether it is an easement merely or an estate upon condition subsequent—a determinable or base fee. What we have said concerning that interest is sufficient to dispose of this appeal, without any more definite expression of opinion in regard to it. It is sufficient, for the present, to say that the judge was in error when he took the other view of it.

New trial.

J. H. GROVES v. FRANK BARDEN.

(Filed 14 April, 1915.)

1. Public Officers—Holding Two Offices, Etc.—Constitutional Law—Penalties—Interpretation of Statutes.

Ordinarily one who occupies a public position which requires him to perform legislative, executive, or judicial acts is a public officer within the intent and meaning of our State Constitution, Art. XIV, sec. 7; and a rural mail carrier being appointed by the Postmaster General of the United States, the head of his department, for the performance of a continuous and not an intermittent service of carrying the mails, and coming within the classification of officers out ined in the Constitution as construed by the Supreme Court of the United States, is subject to the penalty imposed by Revisal, sec. 2365, when in addition to such position he also holds that of a constable. *S. v. Boone*, 132 N. C., 1108, where the incumbent operated a star route under contract with a contractor of the Government, cited and distinguished.

2. Public Officers—Interpretation of Statutes.

In determining whether the incumbent of a certain position is an officer within the meaning of Art. XIV, sec. 7, of our Constitution, the fact that the Legislature in creating the position have declared it an office or employment, is entitled to consideration, though not conclusive or determinative.

APPEAL by plaintiff from *Peebles, J.*, at January Term, 1915, of DUPLIN.

Action to recover a penalty of $200, imposed by section 2365 of the Revisal upon any person who shall presume to hold any office or place of trust or profit contrary to Article XIV, section 7, of the Constitution of the State.

The statute confers the right of action to recover the penalty upon any one who shall sue for the same.

The plaintiff offered evidence tending to prove that the defendant was an acting constable and was at the time a rural mail carrier.

His Honor being of opinion that the position of rural mail carrier was not a public office, entered a judgment of nonsuit, and the plaintiff excepted and appealed.

George R. Ward and John A. Gavin, Jr., for plaintiff.
Stevens & Beasley for defendant.

ALLEN, J. The Constitution, Art. XIV, sec. 7, declares that "No person who shall hold any office or place of trust or profit under the United States or any department thereof, or under this State, or under any other State or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either house of the General Assembly."

The line between "offices" and "places of trust or profit" within the meaning of the Constitution has not been clearly marked, principally because they approach each other so closely, and are in all essential features identical.

In *Doyle v. Raleigh,* 89 N. C., 133, the Court, speaking of this question, says: "It is apparent from the association that 'places of trust or profit' are intended which approximate to but are not offices, and yet occupy the same general level in dignity and importance. The manifest intent is to prevent double officeholding—that offices and places of public trust should not accumulate in any single person—and the superadded words of 'places of trust or profit' were put there to avoid evasions in giving too technical a meaning to the preceding words," and this was affirmed in *State ex rel. Wooten v. Smith,* 145 N. C., 476, the Court adding in the latter case: "The most important characteristic which distinguishes an office from a public agency is that the conferring of the office carries with it a delegation to the individual of some of the sovereign functions of the Government. In this respect the terms 'office' and 'places of trust' as used in our Constitution are synonymous. *Doyle v. Raleigh,* 89 N. C., 136; *Barnhill v. Thompson,* 122 N. C., 495."

In determining whether a position is an office, place of trust or profit, or an employment, the authorities, which are collected in the valuable note to *Attorney-General v. Tillinghast,* 17 A. and E. Anno. Cases, 452, attach significance to the fact that an oath to support the Constitution is required, or that a bond for the faithful performance of duties must be executed, or that the duties are prescribed by law, and not regulated by contract, or that the incumbent discharges independent duties and is not acting under the direction of others, or that the duties are continuing and permanent in their nature and are not occasional or intermittent, or that the term is fixed and continuing and not temporary, or that the position is named an office or an employment in the statute creating it; but in the absence of a constitutional provision these are only circumstances which are entitled to consideration, and are not determinative or conclusive.

The editor of the note says: "It may be stated as a general rule, fairly deducible from the cases discussing this question, that a position is a public office when it is created by law, with duties cast upon the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and not occasional or intermittent; while a public employment, on the other hand, is a position which lacks one or more of the foregoing elements."

Our Court is in line with the current of authority, having adopted and approved the definition of an office, that it is "a public position to

which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public," and saying further: "The most important characteristic which distinguishes an office from a public agency is that the conferring of the office carries with it a delegation to the individual of some of the sovereign functions of the Government." *S. v. Smith,* 145 N. C., 477.

If, therefore, there is no constitutional classification of offices and employments, and a duty is imposed upon the incumbent of a position which requires him to perform a legislative, executive, or judicial act, he is a public officer, and otherwise an employee; and in determining the nature of the duty, the fact that the lawmaking power may have declared the position an office or an employment, although not conclusive, is entitled to consideration.

If these principles are properly applied, the position of rural mail carrier has all the indicia of a public office.

By reference to the postal laws and regulations of 1913, it will be seen (sec. 718) that rural carriers are appointed by the Postmaster General; that they are required to take an oath to support the Constitution (sec. 722), and to execute a bond to secure the faithful performance of their duties (sec. 723); that the oath is referred to as an official oath (sec. 722); his duties are designated as official duties (sec. 752), and mention is made of the official character of the carrier (sec. 740). His term and his duties are fixed by law and not by contract, and the duties are continuing and not intermittent, and affect the public generally. They are defined to be "the delivery into and collection from boxes on their routes of mail matter of all classes, serving of post-offices with mail whenever such service is authorized, sale of stamps and supplies, receiving and receipting for matter presented for registration, delivery of registered matter, the handling of registered matter in transit over their routes, taking of applications for money orders and the money therefor, the forwarding of mail addressed to their patrons and the transfer of mail of former patrons whose addresses have been changed to other routes, the erection of United States collection boxes, and the performance of such other duties as may be required of them by law and the regulations of the department, to administer oaths required of pensioners and their witnesses in the execution of pension vouchers."

It is also provided in section 741 that a rural carrier shall not hold any State, county, municipal, or township office, which is a prohibition usually imposed upon officers, and not upon employees.

We have thus dealt with the question with reference to public offices generally, and not as applied particularly to positions held under the Government of the United States, but as to the latter there seems to be

a dividing line marked by the Constitution itself between offices and employments.

The Constitution of the United States, Art. II, sec. 2, says the President "shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they may think proper in the President alone, in the courts of law, or in the heads of departments"; and in construing this section of the Constitution, the Court said, in *United States v. Germaine,* 99 U. S., 508: "The Constitution, for purposes of appointment, very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But, foreseeing that when offices became numerous and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the Government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment, there can be but little doubt."

It was held in this case that a surgeon appointed by the Commissioner of Pensions was not a public officer, because he was not appointed by the head of a department.

The two cases of *United States v. Hartwell,* 73 U. S., 385, and *United States v. Smith,* 124 U. S., 525, illustrate the application of this rule, making the character of the position to depend upon the source of the appointing power.

In the first it was held that a clerk in the office of the Assistant Treasurer of the United States, appointed with the approval of the Secretary of the Treasury, who was the head of the department, was a public officer, and in the second, that a clerk of a collector of customs, appointed by the collector, who was not the head of a department, was not an officer.

In the latter case the Court says: "A clerk of the collector is not an officer of the United States within the provisions of this section; and it is only to persons of that rank that the term public officer, as there used, applies. An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law, or the head of a department. A person in the service of the Government who does not derive his position from one of these sources is not an officer of the United States in the sense of the Consti-

tution. The subject was considered and determined in *United States v. Germaine*, 99 U. S., 508, and in the recent case of *United States v. Mouat*, 124 U. S., 303. What we have here said is but a repetition of what was there authoritatively declared. . . . The case of *United States v. Hartwell*, 73 U. S. (6 Wall.), 385, does not militate against this view. The defendant there, it is true, was a clerk in the office of the assistant treasurer at Boston, but his appointment by that officer under the act of Congress could only be made with the approbation of the Secretary of the Treasury. This fact, in the opinion of the Court, rendered his appointment one by the head of the department within the constitutional provision upon the subject of the appointing power."

The question was again considered in *United States v. Mouat*, 124 U. S., 303, and the same conclusion reached, the Court saying: "What is necessary to constitute a person an officer of the United States, in any of the various branches of its service, has been very fully considered by this Court in *United States v. Germaine*, 99 U. S., 508. In that case it was distinctly pointed out that under the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law, or the head of a department, and the heads of the departments were defined in that opinion to be what are now called the members of the Cabinet. Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States."

The rural mail carrier is, as we have seen, appointed by the Postmaster General, a member of the Cabinet and the head of his department, and therefore comes within the classification of officers outlined in the Constitution as construed by the Supreme Court of the United States, and this position is not in conflict with *S. v. Boone*, 132 N. C., 1108, in which it was held that a carrier of mails operating upon a star route was not a public officer, because the mail carrier in that case was occupying his position under contract with a contractor of the Government, and not by the appointment of the head of any department of Government, as is the rural mail carrier.

It was held in *U. S. v. McRary*, 91 Fed. Rep., 295, that a letter carrier appointed by the Postmaster General was an officer.

We are, therefore, of opinion that his Honor was in error in holding that a rural mail carrier is not an officer.

Error.

D. C. LOVE, ADMINISTRATOR, v. ELIZABETH P. WEST ET AL.

(Filed 22 April, 1915.)

Limitation of Actions — Mortgages — Actions to Foreclose — Absence from State—Interpretation of Statutes.

Revisal, sec. 366, is general in its terms and excludes from the computation of the statutory period which will bar a right of action the absence from the State for a year or more of the party pleading the statute of limitation, without exception of instances where proceedings *in rem* will lie against property situated here; and where the ten-year statute, Revisal, sec. 391, subsec. 3, relating to the foreclosure of a mortgage on land, is pleaded, the absence of the mortgagor from the State for the length of time prescribed in the first named section, or longer, will not be counted, nor will any presumption of payment of the debt be raised within the period allowed for the commencement of the action.

HOKE, J., concurs in result.

APPEAL by plaintiff from *Allen, J.*, at September Term, 1914, of NEW HANOVER.

Civil action heard upon a report of referee. His Honor confirmed the report, and the plaintiff appealed.

John D. Bellamy & Son for plaintiff.
Herbert McClammy, Bellamy & Bellamy for defendant.

BROWN, J. This action is brought to foreclose a mortgage, executed by Samuel J. West to George Harris in 1877, securing a note payable two years after date. The property described in the mortgage is the one-fifth interest which the mortgagor owned in the mortgaged premises. The defendants pleaded the statute of limitations. The referee and the judge below held that the action was barred.

It is admitted that the mortgagor left the State of North Carolina in 1879 and since then has resided continuously outside of this State. In 1902 the mortgagor conveyed his interest in the property to the defendants Elizabeth P. West and Mariana West. This action was instituted 1 April, 1903, for the purpose of foreclosing the mortgage upon the said one-fifth interest. The said Elizabeth P. and Mariana are parties defendant.

Under section 391, subsection 3, of the Revisal an action for the foreclosure of a mortgage is generally barred in ten years, unless it has been kept alive by payments or renewed promises to pay. But there is a general exception which applies to this cause of action, as well as others.

Section 366, Revisal, reads as follows: "If when the cause of action accrue . . . against any person he shall be out of the State, action may be commenced . . . within the times herein respectively limited

after the return of such person into this State; and if after such cause of action shall have accrued . . . such person shall depart from and reside out of this State or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be taken as any part of the time limit for the commencement of such action or the enforcement of such judgment."

It is contended by the defendants that the proceeding to foreclose a mortgage is an action *in rem*, which could have been commenced at any time, without personal service upon the mortgagor, and that for this reason this particular cause of action does not come within the provisions of section 366.

It is unnecessary to discuss the character of this action, whether *in personam* or *in rem*, as the statute contains no exception. Some of the States have enacted statutes similar to ours, but have provided therein that they shall not apply to proceedings which may act directly upon the property situate within the State, as proceedings *in rem* do; but there is no such exception in our statute.

A number of States have statutes similar to ours, and in all of them, that we have examined, it has been held that an action to foreclose a mortgage comes within the purview of the statute, unless there is an exception, and that the absence of the mortgagor from the State suspends the running of the statute. *Fallwell v. Henning*, 78 Tex., 278; also case, 88 Tex., 368; also case, 89 Tex., 214; *Wood v. Goodfellow*, 43 Cal., 185; *Wall v. Wright*, 66 Cal., 202; *Emory v. Keigham*, 94 Ill., 543; *Robertson v. Stubemiller*, 93 Iowa, 326; *Chicago R. R. v. Cook*, 43 Kan., 83; *Wholly v. Eldridge*, 24 Minn., 358.

We have held that if a debtor is out of the State at the time the cause of action accrues, the statute of limitation does not begin to run until he returns to this State for the purpose of making it his residence. *Armfield v. Moore*, 44 N. C., 157. In that case it is said: "It is not the policy of this State to drive its citizens, directly or indirectly, to seek their legal remedies abroad, or to encourage nonresidents to keep out of it and beyond the jurisdiction of its courts, as would be the case if by keeping out of the State the debtor or person against whom a cause of action exists could avail himself of the lapse of time during his absence." The point presented by this appeal has been practically decided in this Court by *Grist v. Williams*, 111 N. C., 54.

This was an action *in rem* in which the plaintiff was proceeding by attachment against property located within this State, the defendant being a resident of the State of Virginia. In that case it is held that the fact that a nonresident debtor has property within the State will not affect the statutes suspending the operation of the statute of limitations for the period during which the person against whom the judgment is made is out of the State.

It has been suggested that a presumption of payment has arisen against the bond and mortgage sought to be foreclosed. It has been said that for the sake of repose, and to discourage stale claims, the law, after the lapse of twenty years, raises a presumption of payment or rather of an abandonment of the cause of action. That was held, as to a legacy, in *Cox v. Brower,* 114 N. C., 423, and the learned judge writing the opinion seems to think the presumption would apply to bonds and mortgages.

In respect to bonds under seal, the common-law doctrine of a presumption of payment which was rebuttable has been superseded by a statute of limitations, and where the statutory period has expired there is no rebuttable presumption of payment.

The debt is completely barred unless the party seeking to recover on it can rebut the statute in the manner required by law. Under our law bonds and mortgages are barred in ten years, and no action can be maintained thereafter on them in the absence of proof tolling the statute. It is not a rebuttable presumption of payment which arises, but an absolute bar to the action.

This action would be barred in ten years from the date when the mortgage debt became due, but for the express provision of the statute which we have quoted. During the absence of the defendant from the State no limitation or presumption arises against the debt, for the creditor is not compelled to commence his action until after the debtor returns to the State. His absence from the State rebuts the statute and any presumption of payment of the debt.

Upon the findings of fact and admissions in the pleadings, the plaintiff is entitled to judgment of foreclosure. The cause is remanded to the Superior Court of New Hanover County with instructions to enter judgment accordingly.

Reversed.

HOKE, J., concurring in the result: Recognizing the correctness of the position stated in the principal opinion, that on the facts of this case the continued absence of the mortgagee from the State will prevent the running of the statute of limitations, I am of opinion that independent of such statute, and in addition thereto, the common-law presumption of payment after twenty years still prevails with us, and, unless the same is rebutted, that such presumption may defeat a recovery. *In re Dupree's Will,* 163 N. C., 256; *In re Beauchamp's Will,* 146 N. C., 254; *Worth v. Wrenn,* 144 N. C., pp. 656-660; *Cox v. Brower,* 114 N. C., 422; *Headen v. Womack,* 88 N. C., 468; *Cartwright v. Kenan,* 105 U. S., 1; *Campbell v. Brown,* 86 U. S., 396.

In *Cox v. Brower, supra, Burwell, J.,* delivering the opinion, quotes with approval from Lawson on Presumptive Evidence, as follows: "In-

dependently of a statute of limitations, or in the absence of one after a lapse of twenty years, the law raises a presumption of payment as to bonds, mortgages, legacies, taxes, judgments, the due execution of trusts and the performance of covenants."

And in applying the principle, it is held, in *Campbell v. Brown, supra,* and in other cases, that absence from the State will not of itself repel the presumption.

This presumption, however, as heretofore stated, is not absolute as in the case of our present statute of limitations, but is one of fact, and rebuttable by proper evidence. In the present case the note and mortgage having matured in 1879, and twenty-four years having elapsed prior to the institution of the present action in 1903, if nothing else appeared the claim would be barred by reason of the common-law presumption. The referee, however, has found as a fact that the note and mortgage have not been paid off, and the presumption referred to being thus rebutted, I concur in the disposition made of the case.

CHARLES M. BLEAKLEY v. R. L. CANDLER.

(Filed 14 April, 1915.)

Corporations—Shares of Stock—Collateral—Transfer on Books—Judgment Creditor—Priorities.

A pledgee of certificates of stock in a private corporation does not lose his priority of lien to an attachment creditor because the transfer of the collateral has not been theretofore made on the books of the corporation (Revisal, sec. 1168); for the books not being open to public inspection, no good purpose would be thereby subserved, and the effect of a requirement of this character would be to restrict the negotiability of the stock, unduly hamper commercial transactions in respect to it, and consequently depreciate its value.

APPEAL by intervenor from *Lyon, J.*, at November Term, 1914, of FORSYTH.

Action instituted against the defendant Candler to recover the sum of $300 due by note and to enforce an attachment levied upon five shares of stock in the Gilmer Bros. Company, a corporation of North Carolina.

The Commonwealth Bank intervened, claiming that it was the owner of said stock.

The parties agreed upon the following facts:

1. That Charles W. Bleakley is a resident of the State of Virginia, and at the time of the institution of this suit the defendant R. L. Candler was a resident of the State of Maryland, but that since the institution of the action he has died, and L. A. Vaughn of Winston-Salem, N. C.,

has been appointed his administrator; that the interpleader, The Commonwealth Bank, is a banking corporation, organized under the laws of the State of Maryland, doing business in the city of Baltimore in said State; and that Gilmer Bros. Company, the garnishee, is a corporation organized under the laws of the State of North Carolina, with its principal office and place of business in Winston-Salem, N. C.

2. That on 27 June, 1905, Stock Certificate No. 74 for five shares of Gilmer Bros. preferred stock, of the par value of $100 per share, was issued to R. L. Candler, and that the stub of Certificate No. 74 in the possession of Gilmer Bros. Company bears no entries since the date of the issue of the stock.

3. That on 27 October, 1911, R. L. Candler borrowed from the Commonwealth Bank, in the city of Baltimore, State of Maryland, the sum of $700, and executed his promissory note dated 27 October, 1911, for the sum of $700, payable 1 March, 1912, and at the time he secured the said loan he delivered to the bank with the note, as collateral security, Certificate No. 74, for five shares of Gilmer Bros. preferred stock, said certificate being indorsed in blank by him before delivery to the bank.

4. That there is still a balance due on said note of $475, with interest on $700 from 1 March, 1912, to 26 October, 1912, and on $475 from 26 October, 1912, until paid, and that the said Commonwealth Bank still holds said Stock Certificate No. 74 for five shares of Gilmer Bros. stock as collateral security for the payment of said note.

5. That on 31 August, 1912, the plaintiff Charles W. Bleakley instituted an attachment suit in the Superior Court of Forsyth County against R. L. Candler to recover the sum of $300, with interest from 28 February, 1911, said amount being due the said Charles W. Bleakley upon a note executed by R. L. Candler for the sum of $300, in the city of Baltimore, Maryland, on 28 February, 1911. That a warrant of attachment was issued in said action and a summons was served upon Gilmer Bros. Company to appear before the clerk of the Superior Court of Forsyth County and answer upon oath what it owed the defendant R. L. Candler, or what stock the said R. L. Candler had in Gilmer Bros. Company at the time of the service of the attachment, as appears in the record.

6. That Gilmer Bros. Company answered that the stock book of Gilmer Bros. shows that on 27 June, 1905, Stock Certificate No. 74 for five shares of Gilmer Bros. Company preferred stock of the par value of $100 was issued to R. L. Candler, and that said stock certificate is not now in the possession of Gilmer Bros. Company, and it has no knowledge of where said stock certificate now is. Also that it has no knowledge of any debts or effects belonging to R. L. Candler, as appears in the answer of Gilmer Bros. Company.

7. That on 5 September, 1912, the sheriff of Forsyth County served the following notice upon Gilmer Bros. Company:

"You will take notice that by virtue of an attachment issued in the above entitled cause from the Superior Court of Forsyth County, a copy of said attachment having been delivered to you, that I do levy upon the five shares of stock owned in your company by the defendant R. L. Candler, evidenced by Certificate No. 74, and do forbid you from making any transfer of the said stock, or of the certificate representing said stock, upon your stock transfer book until the orders of the court permit you to do so, in the cause now pending as entitled above."

8. That the following is a copy of article 9, sections 2 and 3, of the by-laws of Gilmer Bros. Company:

"SEC. 2. The shares of the company shall be transferable only on the books of the company, upon surrender and cancellation of the outstanding certificates for the shares as transferred, and a new certificate issued therefor.

"SEC. 3. The transfer book shall be the only evidence as to who are the shareholders entitled to vote at any meeting of the stockholders."

9. That the Commonwealth Bank has interpleaded in said action and has asked that it be decreed to have a lien on said five shares of Gilmer Bros. stock prior to that of the plaintiff.

10. That the Commonwealth Bank has not advertised the five shares of stock for sale, but is holding same, and that Gilmer Bros. Company has not paid out any dividends on said stock, but is holding same pending the outcome of this action.

11. That no transfer of Stock Certificate No. 74 was ever made on the transfer book of Gilmer Bros. Company, but that from the transfer book of Gilmer Bros. Company the said R. L. Candler appears to be the owner of Certificate No. 74; that Gilmer Bros. Company has not been requested to make any entry on its transfer book of any kind at any time prior to the issuing of the attachment in this cause, and had no knowledge or notice of the transfer to the Commonwealth Bank prior to the institution of this action and service of this attachment.

12. That L. A. Vaughn, administrator of R. L. Candler, has in his hands, as assets belonging to the estate, the sum of $401.80 in cash, and that claims have been filed by creditors with the said L. A. Vaughn, administrator, aggregating $543.53, other than the claims of this plaintiff; that the $300 claim of plaintiff would make total claims filed with L. A. Vaughn, administrator, and due by the estate of R. L. Candler of $843.53.

His Honor rendered judgment in favor of the plaintiff, holding that the attaching creditor had priority over the bank, and the bank excepted and appealed.

Louis M. Swink for plaintiff.
Manly, Hendren & Womble for defendant.

ALLEN, J. The authorities are in conflict as to the rights of the holder of a certificate of stock deposited as a security for a loan, which has not been transferred on the books of a corporation, as against an attaching creditor, under statutes similar to our own (Rev., sec. 1168), which provides: "The shares of stock in every corporation shall be personal property, and shall be transferable on the books of the corporation in such manner and under such regulations as the by-laws provide; and whenever any transfer of shares shall be made for collateral security, and not absolutely, it shall be so expressed in the entry of the transfer."

It is held in some jurisdictions that the creditor acquires priority by the levy of the attachment, upon the ground that the statute is mandatory, and that it is equivalent to a requirement of registration, and the holder of stock which has not been transferred in accordance with the statute is treated as would be the holder of an unregistered mortgage as against one which has been registered. *Bank v. Folsom,* 7 N. M., 611; *Sabin v. Bank,* 21 Vt., 353; *Bank v. Hastings,* 7 Col. App., 129; *In re Murphey,* 51 Wis., 519.

The weight of authority is, however, against this view, and in favor of the position that the purpose of the statute requiring a transfer upon the books of the corporation is to prevent fraudulent transfers and to protect the corporation in determining the question of membership, the right to vote, the right to participate in the management of the corporation, and the payment of dividends. 2 Cook on Corp., 1367-1389; 4 Thomp. on Corp., sec. 4335; 1 Machen Mod. Law Corp., sec. 886; 3 Ruling Case Law, p. 864; *Masury v. Bank,* 93 F., 605; *Lund v. Mill Co.,* 50 Minn., 36; *Bank v. McElrath,* 13 N. J. Eq., 24; *Wilson v. R. R.,* 108 Mo., 609; *Tombler v. Ice Co.,* 17 Tex. Civ. App., 601; *McNeill v. Bank,* 46 N. Y., 331; *Comeau v. Oil Co.,* 3 Daly (N. Y.), 219; *Finney's Appeal,* 59 Pa. St., 398; *Clark v. Bank,* 61 Miss., 613; *Bank v. Gas Co.,* 6 Wash., 600; *Thurber v. Crump,* 86 Ky., 418; *Bank v. Standrod,* 8 Idaho, 740; *Lipscomb v. Condon,* 56 W. Va., 416; *McCluney v. Colwell,* 107 Tenn., 592; *Cooper v. Griffin,* 1 Q. B., 740; *Everett v. Bank,* 82 Neb., 191; *Bank v. R. R.,* 157 Cal., 573.

In 2 Cook on Corporations, page 1367, the author says: "The decided weight of authority holds that he who purchases for a valuable consideration a certificate of stock is protected in his ownership of the stock, and is not affected by a subsequent attachment or execution levied on such stock for the debts of the registered stockholder, even though such purchaser has neglected to have his transfer registered on the corporate books"; and again at page 1389: "The decisions and statutes of the

various States show clearly that public policy and the legitimate demands of trade have gradually caused the courts and legislatures of the various States to establish the rule that a sale or pledge of certificates of stock has precedence over a subsequent attachment levied on that stock for the debt of the vendor or pledgor, and that the failure of the pledgee or purchaser of the certificate to obtain a registry on the corporate books is not fatal to his interest in the stock."

The case cited from California is also reported in 21 A. and E. Anno. Cases, 139, to which there is a note, collecting the cases by States which fully support the opinion of the editor, that in the absence of a statute which in express terms or by necessary implication gives priority to the attaching creditor, it is generally held that the holder of the stock either as a purchaser or a pledgee has the preference, although the transfer of the stock has not been entered on the books of the corporation.

We adopt the latter position, which is not only supported by the weight of authority, but also, in our opinion, rests upon reason and a sound public policy.

Registration is for the purpose of giving notice, and is based upon the idea that the public have the right to inspect the registry, and this condition does not prevail with us as to the stock book of a private corporation, which those who are not stockholders nor interested in the corporation have no right to see.

As was said in the case from Kentucky, speaking of a statute like ours: "But the section does not operate as a registration law in the interest of the creditors of the stockholders, for the reason that the books of the company are not required to be kept open for the inspection of the public. The books are required to be kept open to the stockholders only; outsiders have no right to demand an inspection of the books."

The provision requiring a transfer upon the books of a corporation cannot be of any practical benefit to the outside creditor, because, as he cannot see the books, he can have no means of knowing whether the transfer has been made or not; and in this respect the law as to the registration of mortgages furnishes no analogy, because the registry of mortgages is open to the public.

The other view would also unduly hamper commercial transactions and would have a tendency to depreciate the value of stock, as do all restrictions upon its negotiation.

If it should be held that a transfer upon the books of a corporation is necessary to vest the title in a purchaser or a pledgee, the owner of stock in order to secure a loan would have to incur the expense and trouble of having the stock transferred to the lender upon procuring a loan, and of having it retransferred upon payment, and if he borrowed in sections where the books of the corporation were not accessible, it would make it

difficult, if not impossible, to procure a loan, and one of the elements of value would be greatly impaired.

It is true that in *Morehead v. R. R.,* 96 N. C., 365, there is an intimation that a transfer of stock can only be effectual by a transfer upon the books of a corporation, but the later cases of *Havens v. Bank,* 132 N. C., 214, and *Cox v. Dowd,* 133 N. C., 537, are in line with the current of authority.

In the *Havens case* the Court quotes with approval from *McNeill v. Bank,* 46 N. Y., 523, that "The common practice of passing the title to stock by delivery of the certificate with blank assignment and power has been repeatedly shown and sanctioned in cases which have come before our courts. . . . It has also been settled by repeated adjudications that, as between the parties, the delivery of the certificates with assignment and power indorsed passes the entire title, legal and equitable, in the shares, notwithstanding that by the terms of the charter or by-laws of the corporation the stock is declared to be transferable only on its books; that such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and that no effect is given to them except for the protection of the corporation; that they do not incapacitate the shareholder from parting with his interest, and that his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections."

The authorities and reasoning as to the effect of a public statute upon the rights of the parties have greater force when applied to the by-laws of a corporation, which are intended primarily to regulate dealings between the corporation and its stockholders.

We are therefore of opinion, upon reason and authority, that his Honor was in error in holding that the attaching creditor has a priority.

Reversed.

COLONIAL TRUST COMPANY, W. L. GARRIS AND WIFE v. STERCHIE BROTHERS, W. V. HALL, AND N. W. WALLACE, SHERIFF.

(Filed 28 April, 1915.)

Trusts and Trustees—Deeds and Conveyances—Parol Trusts—Judgments—Liens—Registration—Notice—Consideration.

A parol trust in lands in favor of a grantor of a deed purporting to convey the fee cannot be established, the effect being to contradict the writing by parol; and where a judgment has been obtained and docketed against the grantee, the lien thereof immediately attached upon the registration of his deed, and cannot be defeated by a deed in trust subsequently registered and carrying out the agreement theretofore resting only in parol; and the consideration recited in grantee's deed is immaterial. Revisal, sec. 980.

WALKER, J., concurs in result.

APPEAL by plaintiffs from *Harding, J.*, at chambers, 28 December, 1914; from MECKLENBURG.

This is an appeal from a refusal by the judge to continue a restraining order to the hearing.

The plaintiffs allege in their complaint that on 1 May, 1913, the Colonial Trust Company conveyed to the defendant W. V. Hall, by deed in fee simple, with warranty, and reciting "$100 and other valuable consideration," certain lots in Charlotte, which deed was duly recorded in the office of the register of deeds of Mecklenburg on that date. A few days later (3 May) Hall conveyed the property by deed of trust to J. W. Barry, trustee, to secure a loan of $900, which was also duly recorded. In December, 1913, at the request of the Colonial Trust Company, Hall by deed duly recorded conveyed said lots in fee simple, with the usual covenants of warranty, to plaintiffs Garris and wife.

In May, 1909, the defendants Sterchie Brothers obtained judgment against W. V. Hall, which was duly docketed 3 June, 1909, in Mecklenburg County. On 14 November, 1914, the defendants Sterchie Brothers caused an execution to be issued on aforesaid judgment against W. V. Hall, and the aforesaid lots were advertised for sale thereunder. The plaintiffs obtained a restraining order against the sale of said lands, returnable before *Harding, J.*, at the courthouse in Charlotte, 28 December, 1914, alleging that when the property was conveyed by the Colonial Trust Company to the said W. V. Hall he paid nothing therefor, and that there was a contemporaneous agreement that he should hold only the naked legal title and was to execute a declaration of trust, and that therefore Hall had no interest which could be sold under the execution. The defendants demurred upon the ground that no cause of action was stated. His Honor, being of that opinion, dissolved the restraining order, and the plaintiff appealed.

J. W. Barry for plaintiffs.
Robert S. Hutchinson for defendants.

CLARK, C. J. In *Gaylord v. Gaylord*, 150 N. C., 222, it was held that "where there is a deed, conveying the absolute title to land, giving clear indication on the face of the instrument that such title was intended to pass, a contemporaneous parol trust cannot be set up or engrafted in favor of the grantor. The vendor cannot in such case by a contemporaneous parol agreement contradict his written conveyance. A trust in favor of the grantor to secure the purchase money, or for other purposes, must be in writing." *Gaylord v. Gaylord* has been cited with approval in *Newkirk v. Stevens*, 152 N. C., 502; *Dunlap v. Willett*, 153 N. C., 321; by *Brown, J.*, in *Ricks v. Wilson*, 154 N. C., 286; *Weaver v. Weaver*, 159 N. C., 21; *Jones v. Jones*, 164 N. C., 322, and *Cavenaugh v. Jarman, ib.*, 375.

The plaintiffs, therefore, cannot claim under the alleged cotemporaneous parol trust as against the lien of the docketed judgment in favor of Sterchie Brothers which attached upon the registration of the deed to Hall; nor can they claim under the subsequently executed deeds made by Hall. The condition of the plaintiffs cannot be stronger than that of a vendor who has taken a mortgage, or a deed of trust, or who has received a written declaration of trust from the vendee to secure the purchase money, but has failed to place the same on record. When the deed to Hall was recorded the lien of the defendants' judgment at once attached to the land, and was superior to any equity which the trust company either retained or attempted to retain by the alleged parol agreement or by any subsequently recorded conveyance. The amount of consideration recited in the deed to Hall is immaterial. If it amounted to notice, under our registration laws it could not avail against the lien of prior registered conveyances or docketed judgments.

Revisal, 980, commonly known as the "Connor Act," provides: "No conveyance of land, or contract to convey, or lease of land for more than three years, shall be valid to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or lessor, but from the registration thereof within the county where the land lies." Even if there had been a trust or mortgage executed in writing simultaneously with the conveyance to Hall, it would not avail against the lien of a docketed judgment, or a conveyance by Hall registered prior to the registration of the trust deed, or mortgage to secure the purchase money. In *Bunting v. Jones,* 78 N. C., 242, it was held where the vendor's deed and the mortgage by the vendee to secure the purchase money were made simultaneously and recorded together, that then the lien of a judgment did not take priority over the mortgage to secure the purchase money. This case has been cited with approval, see Anno. Ed., in many cases down to *Hinton v. Hicks,* 156 N. C., 24, in all of which the conveyance and the mortgage back were "filed for registration at the same moment." In such case the title does not vest in the vendee for a single moment, but, as *Judge Reade* said in *Bunting v. Jones, supra,* it is "Like the Borealis' race, that flits ere you can point their place."

In the present case the conveyances in pursuance of the alleged trust were not executed, much less registered, till afterwards.

In *Quinnerly v. Quinnerly,* 114 N. C., 145, it was held that a mortgage for the purchase money of land is not entitled to priority over a second mortgage which is filed first, even though the second mortgagee may have actual notice of the unregistered prior mortgage, and that this was so prior to the passage of the Connor Act, which merely extended the principle to deeds and judgment liens. That case has been cited in many cases quoted in the Anno. Ed., and since then it has been further cited

and approved, together with other cases of like tenor, in *Piano Co. v. Spruill,* 150 N. C., 169; *Moore v. Quickle,* 159 N. C., 130; *Moore v. Johnson,* 162 N. C., 272, and there are many other cases affirming the same doctrine which do not cite *Quinnerly v. Quinnerly* by name.

Under the provisions of the Connor Act the holder of a subsequently registered conveyance takes subject to the lien of a judgment creditor of the grantor where the judgment was rendered and docketed before the registration of the deed, even though there was an agreement between the grantor and the grantee that such deed should not be registered till the payment of the purchase money. *Tarboro v. Hicks,* 118 N. C., 163; *Bostic v. Young,* 116 N. C., 766; *Francis v. Herron,* 101 N. C., 497.

In *Quinnerly v. Quinnerly, supra,* it was said: "It is altogether too late to contend that the vendor of real estate, who has conveyed it by deed, has a lien upon the land for the purchase money; nor can the vendor reserve a lien unless he takes his security in writing and have it registered. All secret trusts, latent liens, and hidden encumbrances are, and were intended to be, cut up by the roots by the force of our registration laws, and since the decision of this Court in *Womble v. Battle,* 38 N. C., 182, the law as here announced has been considered as well settled in North Carolina." Decisions to the contrary can be found in Tennessee, and other States which retain the doctrine of "vendor's lien for purchase money," which was repudiated by us in *Womble v. Battle, supra.*

It seems that the object of the Colonial Trust Company in the conveyance to Hall was to procure money through a mortgage put on the property by him, and thus avoid injury to its credit by executing a mortgage itself. It might have taken a mortgage back and have had the same recorded simultaneously with its deed. Not having done so, the lien of the judgment against Hall takes priority, and the court properly held that the complaint did not state a cause of action.

Action dismissed.

Walker, J., concurs in result.

J. M. McCASKILL et al. v. PEGRAM FARM AND LUMBER COMPANY.

(Filed 28 April, 1915.)

1. **Limitation of Actions—Deeds and Conveyances—Color—Adverse Possession—Title Out of State—Twenty-one Years.**

Where in an action to recover lands a party claims under a grant from the State and mesne conveyances, and fails to show a connected paper title by not locating the lands within the description of the grant, it is necessary for him to show adverse possession of a sufficient character for twenty-one years under color to take the title out of the State and vest it in himself.

2. Limitation — Deeds and Conveyances —"Color"— Adverse Possession — Character of Possession—Evidence Sufficient.

The continuity and character of possession necessary to ripen the title of the claimant under color is held sufficient which shows the paper title of the claimant, that the land was woodland, uncleared and unprofitable to cultivate, and that he and those whose previous possession inures to his benefit had supplied themselves with wood, of which they used a great deal, and had but little woodland on an adjoining tract whereon they lived; that the land had been bought to obtain this wood supply; that their possession of this character had been continuous for the statutory period, and no adverse claim had been made upon the land before the institution of the present action. *Locklear v. Savage*, 159 N. C., 236, cited and applied.

Appeal by plaintiff from *Lane, J.*, at December Term, 1914, of Richmond.

Action to recover land. The plaintiffs alleged that they were the owners of the land in controversy, and this was denied by the defendant.

At the conclusion of the evidence his Honor entered judgment of nonsuit upon motion of the defendant, and the plaintiffs excepted and appealed.

John P. Cameron and M. W. Nash for plaintiffs.

Adams, Armfield & Adams, and Stack & Parker, and Lowdermilk & Dockery for defendant.

Allen, J. The plaintiffs have failed to show a connected chain of title to the land in controversy, as they did not locate the grant introduced in evidence, and they must rely on an adverse possession for twenty-one years under color to take the title out of the State and vest it in themselves. *Mobley v. Griffin*, 104 N. C., 112. They introduced in evidence a deed to their father, who is dead, dated 14 February, 1880, and registered 12 December, 1885, which is color of title, and offered evidence that this deed covered the land in dispute.

The question, therefore, presented by the appeal is whether any evidence of adverse possession was introduced which ought to have been submitted to the jury, and in passing upon this question we have no right to determine the weight or sufficiency of the evidence, but simply to determine whether there was any evidence of the fact, giving to it the construction most favorable to the plaintiffs.

The authorities on what is necessary to constitute an adverse possession are fully reviewed in *Locklear v. Savage*, 159 N. C., 236, and it is there said: "It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not

merely as an occasional trespasser. It must be as decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner. *Loftin v. Cobb,* 46 N. C., 406; *Montgomery v. Wynns,* 20 N. C., 527; *Williams v. Buchanan,* 23 N. C., 535; *Burton v. Carruth.* 18 N. C., 2; *Gilchrist v. McLaughlin,* 29 N. C., 310; *Bynum v. Carter,* 26 N. C., 310; *Blount v. Simpson,* 14 N. C., 34; *Tredwell v. Reddick,* 23 N. C., 56."

Applying this rule, we are of opinion there was evidence of an adverse possession which ought to have been submitted to the jury.

The evidence of the plaintiffs tended to prove that the land in controversy is woodland; that there is no house on it; that up to the time of the entry of the defendants, about 1910, none of it had been cleared, and that it could not be cultivated profitably; that the father of the plaintiffs and, after his death, their mother lived on another tract of land about a mile distant; that there was very little wood on the land on which they lived; that their father was a school teacher and used a great deal of wood, and that the land was bought for wood.

J. M. McCaskill testified that his father died in 1888, leaving two children, who are the plaintiffs; that he stayed at home with his father and mother from the time the land was bought until the fall of 1887; that after he left home, in 1887, he returned five or six times each year; that the land in controversy was bought for the purpose of getting wood and lightwood from it; that up to the time he left home he hauled wood and lightwood from the land; that he cut blackjack on the land and burned it for ashes; that he hauled wood and lightwood from the land every winter and all during the winter; that this was done every year while he was at home; that after his father died, his mother took charge of the land, and that she used it as it was used when he was at home; that his mother married a Mr. Hart about 1898, and that it was used by them as it had been before; that it had been used every year since it was bought; that Mr. Hart had blackjack cut on the land and they had to get wood and lightwood from it all the time; that no one ever disputed their title to the land up to the time of the entry by the defendant, and that the land was worked by different persons for them.

C. W. McCaskill, another plaintiff, testified that he was 7 years old when his father died, and that he did not leave home until about 1900; that he used the land for lightwood, with his father's permission; that the land was used each year for getting wood and lightwood; that his mother used it for turpentine; that from 1900 to 1910 his stepfather was using the land for the purpose of getting wood and lightwood; that after he left home he returned each year and saw how the land was used; that they got their winter's wood from the land each year as long as he stayed at home, and also their wood for the summer from the land.

Daniel McQueen, a witness for the plaintiffs, testified that he was more than 60 years old; that he worked on the land for Mr. McCaskill, father of the plaintiffs, while he was living; that he worked for him every year; that he got wood and lightwood for him until he died; that he worked on the land after he died; that he hauled wood and lightwood and cut blackjack and cut down trees; that he got wood and lightwood off the land more or less every year that Mr. Hart was living; that he commenced working on the land for Mr. McCaskill and then worked on it for Mr. Hart, and that he thinks he worked on it as long as twenty-one years or more.

There was other evidence introduced in behalf of the plaintiffs tending to corroborate the evidence of these witnesses.

Reversed.

J. C. ROBERTS v. BOWEN MANUFACTURING COMPANY.

(Filed 28 April, 1915.)

1. Liens—Private Corporations—Laborers—Corporate Mortgages—Registration—Interpretation of Statutes.

Revisal, sec. 1131, giving a lien by judgment upon the property or earnings of a private corporation to those performing labor, etc., superior to that of a mortgage, expressly refers to a mortgage given by the corporation itself, and not to mortgages on the corporate property acquired by a stranger and registered before the formation of the corporation.

2. Statutes, Interpretation of—Ambiguity—Language Used—Legislative Intent—Public Policy—Power of Courts.

A statute should be construed with reference to the whole or related subjects of other statutes of which it is a part, and when ambiguously expressed, the courts, in proper instances, may consider injurious consequences as affecting the public in its business; but where the statutes are consistently, plainly, and clearly expressed, no need for construction arises, it being within the province of the Legislature to declare the public policy of the State, and of the courts to construe the statute so as to give effect to the legislative intent as gathered from the language used.

3. Same—Insolvent Corporations—Assets.

Property acquired by a private corporation subject to a valid and registered mortgage does not become assets of the corporation except as subject to the prior lien; and the lien given to laborers on the assets of an insolvent corporation for work done under the conditions stated in Revisal, sec. 1206, cannot affect the vested rights obtained by the prior lien holders.

4. Corporations—Receivers—Title—Prior Encumbrances.

The title of a receiver of a private corporation to the corporate property relates back only to the time of his appointment, and it cannot divest the property of valid liens existing at that time.

5. Same—Liens—Laborers—Mortgages—Registration.

Where the receiver of a lumber manufacturing corporation enters into a contract with an individual to continue the manufacture of lumber, reserving title to the property as a guarantee that the latter will discharge his contractual obligations, and after registration of this contract another corporation is formed, to which the contract rights of the individual have been assigned, and the second corporation becoming insolvent, and a receiver being regularly appointed for it, the lien given by Revisal, sec. 1206, to laborers for an insolvent corporation will not be construed as superior to the rights of the receiver of the first corporation under his prior and registered contract.

APPEAL by J. C. Biggs, receiver, from *Allen, J.*, at March Term, 1915, of BLADEN.

On 29 December, 1913, the Newton-McArthur Lumber Company, a corporation, failed in business, was declared insolvent by the court, and J. C. Biggs appointed receiver of its assets in a proceeding under the statute. Through the receiver the said company entered into a contract with W. T. Bowen by which it agreed to sell to him, and he agreed to buy, cut, and manufacture, upon the terms and conditions therein specified, all the pine and other merchantable timber owned by it under contracts, deeds, and leases, in Bladen County. The timber was to be paid for at prices and at dates named in the contract, which was duly registered in said county in January, 1914. W. T. Bowen assigned his interest in the said contract to the Bowen Manufacturing Company, another corporation, on 2 March, 1914. It was also agreed in the Newton-McArthur Company contract with W. T. Bowen that the former should furnish to the latter, for the manufacture of said timber, its entire plant at or near Elizabethown, including sawmill, planing mill, and logging equipment, with all live stock and all buildings and real estate owned by it, excepting certain land, and all of its furniture and fixtures in the commissary and office, except the adding machine. This was done, and the property so furnished was delivered by W. T. Bowen to the Bowen Manufacturing Company when he sold his interest in the contract to the latter company. The Bowen Company, up to 15 August, 1914, had cut timber and manufactured the same into lumber, there being at that time on its yards 492,491 feet of lumber. On 2 September, 1914, the Bowen Company was declared insolvent, and J. A. Lyon appointed receiver of its assets. It then owed its employees and laborers for work and labor the sum of $3,400. These claims had been reduced to judgments, executions issued thereon and levies made upon its property and effects in August, 1914, before the receiver was appointed. The proceeding (*Harnett Lumber Co. et al v. Newton-McArthur Lumber Co.*) in which J. C. Biggs had been appointed receiver was transferred from Bladen to Cumberland County, and an order entered therein at September Term, 1914, restoring to him all the property left, which was covered by his contract with W. T. Bowen, with this exception: "It is

further ordered and decreed that the lumber on hand at the plant of the Newton-McArthur Lumber Company, which was manufactured by the Bowen Manufacturing Company, and which has heretofore been delivered to J. Alden Lyon, receiver of the Bowen Manufacturing Company, is excepted from the operation of this order, and the rights of J. Crawford Biggs, receiver of the Newton-McArthur Lumber Company, to said lumber or the proceeds arising therefrom is reserved for the further determination of the court."

The lumber on the yards at Elizabethtown was sold by J. A. Lyon, receiver, and he has in hand $4,200, and $700 owing to him for lumber sold, which is about all of the assets of the Bowen Company left, which will be insufficient to pay the claims of the employees and laborers and the claim of J. C. Biggs, receiver, under the contract with Bowen, which amounts to $2,188.85, it being due for lumber. The claims of the employees and laborers of the Bowen Company, amounting to $3,400, were for work and labor performed within sixty days prior to the appointment of J. A. Lyon as receiver of the Bowen Company, and within four weeks prior to the closing down of the plant by the Bowen Company in August, 1914. Three-fourths in value of the lumber on hand at the plant, and which was sold by J. A. Lyon, receiver, was manufactured prior to the time when said work was done and labor performed by the said claimants. It is stated in the case: "That J. C. Biggs, receiver of the Newton-McArthur Lumber Company, knew that W. T. Bowen had organized a corporation known as the Bowen Manufacturing Company, and that this corporation was operating the plant and cutting the timber covered by contract, Exhibit A, but he did not know of the arrangement or contract which W. T. Bowen had made with the Bowen Manufacturing Company for the operation of the plant." It was provided in the contract between the Newton-McArthur Company, by J. C. Biggs, receiver, and W. T. Bowen, that the former should have a lien on "all lumber on hand," and "all supplies, goods, and merchandise transferred by the contract," for the full performance of the same, and that it should stand as security therefor, and specially "for the payment of any amount due or to become due under the terms of the contract." As additional security, the title to all of the timber covered by the contract was retained by the Newton-McArthur Company until its stipulations were all fully performed, and it was further agreed that "the vendee, W. T. Bowen, should have no right to sell said standing timber, but only to cut and manufacture the same at the company's plant," except the oak and gum logs. W. T. Bowen gave a bond to the Newton-McArthur Company in the penalty of $10,000, conditioned for the payment of all sums due for timber cut by him and for the faithful performance of his contract with said company. There are other provisions in the contract, not necessary to be set out.

The court held and adjudged that the claims of the employees and laborers of the Bowen Manufacturing Company should be paid first, after the costs and expenses of the receivership of J. A. Lyon, and that the balance, if any, should be paid to J. C. Biggs, receiver of the Newton-McArthur Company, and from this judgment J. C. Biggs, receiver, and the Newton-McArthur Company appealed.

Robinson & Lyon for plaintiff.
Sinclair, Dye & Ray and R. W. Winston for defendant.

WALKER, J., after stating the case: The appellees, who are the claimants of the amounts due them from the Bowen Manufacturing Company for work and labor performed in cutting and manufacturing the timber into lumber, base their right to a preference in payment out of the funds over the Newton-McArthur Lumber Company and J. C. Biggs, its receiver, upon Revisal, secs. 1131 and 1206. The first of these sections provides as follows: "Mortgages of corporations upon their property or earnings, whether in bonds or otherwise, shall not have power to exempt the property or earnings of such corporations from execution for the satisfaction of any judgment obtained in courts of the State against such corporations for labor performed, nor torts committed by such corporations whereby any person is killed or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding." It will be seen, at a glance, that this section refers to mortgages made by the corporation for which the labor was performed, and it says this in so many words. The substance of it, when properly analyzed, is that mortgages of *corporations* upon their property, etc., shall not exempt the property and earnings "of *such corporations*" from execution upon a judgment based upon labor performed for or torts committed by "*such corporations*." It is too plain to require argument of the question that it refers only to mortgages made by the very corporations whose laborers have not been paid. That is not our case. It may be remarked here that every case in which the section has been successfully invoked to protect the claims of laborers from prior mortgages has been of that kind.

In reply to the contention of appellees, that section 1206 applies, the appellants say: This section does not apply in this case, in that the purpose of that section is to give the claims of employees of an insolvent corporation a first lien upon the assets of such corporations; and appellant insists that his interest in the lumber on hand is not an asset of the Bowen Manufacturing Company; that his interest therein is protected by his contract with Bowen, and that the manufactured lumber cannot be treated as an asset of the Bowen Manufacturing Company until the stumpage of appellant is deducted therefrom. The appellees'

claims are against the Bowen Manufacturing Company, and appellant's rights arise by virtue of his contract with Bowen, and whatever rights the Bowen Manufacturing Company acquired from Bowen are subordinate to the rights of the appellant under his contract with Bowen, and it would seem to follow logically that the rights of employees of the Bowen Manufacturing Company are subordinate to appellant's rights; it is clear that the employees of Bowen could not have priority under Revisal, sec. 1206, to the rights of appellant, as that statute is limited to employees of insolvent corporations, and where appellant, as receiver of the court, executes a contract with an individual, it cannot be that because the latter sees fit to organize a corporation to perform his contract with an officer of the court, the employees of the corporation which takes the assignment of the contract can come in ahead of the rights of the receiver, who likewise represents creditors, especially where the contract is duly recorded.

We think that this position is sound. Section 1206, so far as it has any bearing upon this case, is not substantially different from section 1131, as a proper consideration of its terms will show, except that it is not confined to prior mortgages and is different in respect to the time for which the "first and prior lien upon its assets" of its laborers is given retroactive operation. It provides for a lien, in favor of laborers and other employees, upon the assets of an insolvent corporation for wages due for work, labor performed, and services rendered within two months next preceding the date on which the proceedings to declare the corporation insolvent are commenced, "which lien shall be prior to all other liens that can or may be acquired upon or against *such* assets." It evidently has no application to a case of this kind, as there was no privity between the appellants and the Bowen Manufacturing Company, and they claim under a separate and independent lien, created some time prior to the formation of the Bowen Manufacturing Company, for which the appellees performed the work and labor, and by a contract, not between that company and appellees, but between the latter and W. T. Bowen, an individual. The lien covered by section 1206 is one which exists strictly against the assets of the insolvent corporation, and is preferred only to one acquired upon those *assets* by some one else, and not one acquired before the corporation was chartered and organized, and which arose out of dealings between entire strangers.

As between lienors, in respect to the assets of the insolvent corporation and whose liens rest specifically upon them as assets of the corporation, the laborer has the preference. We need not decide to what length this lien of the laborer may be extended and what particular liens will be subordinated to it. It is sufficient to say, in this case, that it does not overreach the appellant's lien.

While the case may not be directly in point, there is some analogy afforded by the reasoning in *McAdams v. Trust Co.*, 167 N. C., 494. We there said: "The work and labor was performed and the materials furnished by the plaintiff with full knowledge, in law, at least, and also in fact, of the prior mortgage. He must be presumed to have been able to take care of his own interests and to have contracted for a lien with reference merely to the equity of redemption and in subordination to the older encumbrance, of which he had full notice, and his case must now be judged by these considerations. The mortgagor could not give him a better right or title than he himself possessed at the time. As the work was commenced after the defendant's mortgage was registered, the lien of the plaintiff is subject to the prior lien of the mortgagee, and the court should have so declared."

Nor do we think the fact that the assets of the insolvent corporation are being administered by a court of equity can make any difference. The doctrine of *Fosdick v. Schall*, 99 U. S., 235, seems to be restricted to railroads and similar, or *quasi*, corporations. The weight of authority is that the rule applicable to railroad cases in regard to the displacement of the lien of a mortgage does not extend to private corporations. A full discussion, with citation of the authorities, will be found in *First National Bank v. Cook*, 2 L. R. A. (N. S.), p. 1012, and especially in an elaborate note at p. 1057. "Where the parties are all before the court, and do not object, and where it is necessary to put the property in a marketable shape, it seems that the court may authorize the payment of claims in preference to mortgage liens. But the weight of authority holds that it is not the province of a court of equity to undertake the management of a private business, and to create liens thereon, without the consent of the mortgagee, and that it cannot displace the lien of the mortgage where the mortgagee asserts an independent title under his instrument of mortgage giving him the right of possession." *Bank v. Cook, supra*. The Court said, regarding this question, in *Kneeland v. Am. L. and T. Co.*, 136 U. S., 97: "Upon these facts, we remark, first, that the appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. We emphasize this fact of the sacredness of contract liens for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens." "Where property comes into the hands of a receiver subject to prëexisting liens, it is as much his duty to preserve and protect such liens in favor of the holders thereof as it is to make a just distribution of the assets among the unsecured creditors." High on Receivers, sec. 138; *American T. and S. Bank v. McGettigan*, 152 Ind., 582. The title of a receiver

relates only to the time of his appointment, and valid liens existing at that time are not divested thereby. *Bank v. Bank,* 127 N. C., 433; *Pelletier v. Lumber Co.,* 123 N. C., 596; *Fisher v. Bank,* 132 N. C., 776; *Kneeland v. Loan and Trust Co., supra.* In *Int. Trust Co. v. Decker,* 152 Fed. Rep., 78, 11 L. R. A. (N. S.), the Court, quoting from *Trust Co. v. United Coal Co.,* 27 Col., 246, said: "We are of opinion that, in administering the affairs of an ordinary insolvent private business corporation for which a receiver has been appointed, a court of equity has not the power to authorize the receiver to incur indebtedness for carrying on the business, and to make the same a first and paramount lien upon the corpus of the property, superior to that of prior lien holders, without their consent." *Union Trust Co. v. S. S. and L. Co.,* 166 Fed., 193.

In construing a statute, where there is ambiguity in its words, we have the right to consider the unjust, and certainly the disastrous, consequences of a given meaning, and we will not so consider it as to impliedly impute to the Legislature any intention to do what is manifestly unjust, or to embarrass and hamper the public in its business dealings, unless such a construction is unavoidable by reason of the plainness of the language and the clearness of the meaning, that body being the only one to declare the public policy of the State, whether it be right or wrong, according to the view of the moralist. In doubtful cases we decide in favor of right and justice; but if the intent is plainly expressed it is to be followed without further inquiry. 2 Lewis's Sutherland on Stat. Constr., sec. 367 (238), pp. 702, 703. The courts have united in saying that if a construction of the statute in question must lead to absurd and mischievous consequences, it is inadmissible, if the statute is susceptible of another meaning by which such consequences can be avoided. This is not only a canon of construction adopted by the courts and text-writers, but it is, as well, the rule of common sense. But in applying this rule we must not forget or overlook the restriction of it within its proper limits, which has also been sanctioned, and a careful observance of which has been enjoined by the courts. This restriction is applicable to other canons of interpretation, and may be thus stated, following the lead of one of our highest courts: The spirit of the instrument, especially of the Constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of the instrument expressly provided shall be exempt from its operation. Where words conflict with each other, where the different clauses of the instrument bear upon each other, and would be inconsistent unless the natural and common import of the words be varied, construction becomes necessary; and to depart from the obvious

meaning of the words is justifiable. Yet in no case should the plain meaning of a provision, not contradicted or qualified by any other provision in the same instrument, be disregarded because we believe the framers of that instrument could not intend what they say. It must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application. *Sturges v. Crowinshield,* 4 Wharton (N. S.), 202 (4 L. Ed., 529). It has been said that to authorize a departure from the literal construction, one of two things must be shown: either that there is some other part of the statute which cuts down or expands its meaning, or else that the provision itself is repugnant to the general purview. *Douglass v. Freeholders,* 38 N. J. L., 214; *Hyatt v. Taylor,* 42 N. Y., 262; *Gwynne v. Burwell,* 6 Bing. (N. C.), 559; Sutherland, p. 705, and note 45. We should also construe the entire statute, and keep in mind constantly that the general legislative intent is a key to its meaning, and a statute should be considered also as an entirety with reference to the whole system of which it is a part. Sutherland, secs. 348, 368, 369. If we apply these rules, it is not hard to determine that the Legislature did not intend to destroy vested rights of which the claimants had due and timely notice by registration of the contract, or to give a lien, when it would arbitrarily deprive another of his contractual rights, already fixed, as between him and another, who is not the corporation upon whose assets the lien can only rest. It would render uncertain the security of mortgagees and lien holders if we should uphold the asserted right of lien, and would consequently hamper and handicap investment of money in legitimate enterprises, which would entail more real loss to the laborer or lienor than of benefit he would derive from the other construction. If a lender of money, who takes a mortgage on land, will lose his lien if the mortgagee should sell the timber to a corporation, so that the latter can incur obligations to his employees and laborers, which must be paid before the mortgage debt, investors of money would become chary and would speedily withdraw from the market. This would entail serious consequences, and do more harm than good in our business affairs. The laborer is worthy of his hire, and should be paid, and preferred in payment, because of his dependence upon his daily wage, but we should be careful to see that, by mere construction of the statute, we do him no harm in the effort, inspired by our sense of right, to do him full justice.

The distribution, as ordered by the court, should have been reversed. The claim of J. C. Biggs, receiver of the Newton-McArthur Company, will be paid first, and then the costs and expenses of this proceeding, and the claims of the appellees in the order named.

Reversed.

HOKE, J., concurs in result.

W. J. CROWELL v. MARYLAND MOTOR CAR INSURANCE COMPANY.

(Filed 28 April, 1915.)

1. Insurance—Policies—Contracts—Interpretation.

A contract or policy of insurance, like any other contract, is construed to carry out the intention of the parties as gathered from the words employed, and strictly against the insurer when ambiguously or obscurely expressed, as presumably it has been prepared by it; and the object of the contract being to afford an indemnity against loss, it will be so construed as to effectuate this purpose, rather than defeat it.

2. Same—Automobiles—Reasonable Provisions—Hire or Passenger Service.

In construing a policy upon an automobile, with express provision that it "will not be rented or used for passenger service of any kind for hire except by special consent of the company indorsed on the policy," it is held that a single act of renting or using the car for hire, by an employee of the owner without his knowledge, will not in itself be considered as such a breach of the owner's warranty as will forfeit the insurance thereon.

3. Same—Loss by Fire—Continuous Service.

Where the owner of a garage having automobiles for hire also keeps one there, with the others, but as his private car and for his own personal use, and has the same insured under a policy containing the provision that he will not rent out or use the car for passenger service for hire, the facts that his employee, without his knowledge, had taken a party out for hire in the machine to a certain place, and, on the next day, after the passengers had been discharged, and after the owner had himself resumed possession and control of the car, it was destroyed by fire, and that some time before, and on another occasion, this car had been used by an employee once in taking a passenger to the railroad station, do not constitute a forfeiture of the insurance, the renting or using the car for hire, as expressed in the policy, contemplating something of a more continuous nature than the isolated instances mentioned.

4. Same—Hazard or Risk.

The plaintiff having lost his automobile by fire, which was insured under a policy providing it should not be rented out or used in passenger service for hire, sued to recover thereon, and it appeared that immediately before the loss his employee, without his knowledge, had used the car for hire to others, but that the loss had occurred thereafter, and while being returned, after having some repairs made, to the owner's garage under his directions. There being no evidence that the outward trip had any direct bearing upon the loss, or increased the risk at the time thereof, it is *Held*, that, under the circumstances, the loss did not fall within the intent and meaning of the prohibitive clause of the policy, so as to work a forfeiture thereunder.

APPEAL by defendant from *Shaw, J.*, at October Term, 1914, of MECKLENBURG.

The defendant insured the plaintiff's motor car and accessories for $1,000, under a policy which, by its eighth clause, provided as follows: "The motor car hereby insured will not be rented or used for passenger service of any kind for hire, except by special consent of this company

indorsed hereon in writing." The tenth and eleventh clauses declare that the policy shall be void if there be false representation or concealment in certain particulars set forth, or any fraud or false swearing about any matter relating to the insurance, and shall also be void if the interest of assured in the car be other than the sole and unconditional ownership, or if it be or become encumbered by a chattel mortgage, or if there is any change in the owner's interest or title, other than that caused by his death, whether by legal process or judgment or by his voluntary act, or otherwise. The nineteenth clause provides that "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the loss or damage." In November, 1913, plaintiff was the owner or proprietor of a garage in the city of Charlotte, N. C., and sometimes hired automobiles, and held a license for the purpose. He also kept the car in question in the garage for his own use, and not for renting or to be used in passenger service of any kind for hire, though it had been used just once, before it was burned, to take a man to the railroad station. The car was taken from the garage by Ben Stitt, one of plaintiff's employees, and he carried a party of bird hunters in it to Lincoln County on Thanksgiving day, 1913. It was punctured several times on the return, and finally left at a place on the Dowd road, 6 miles from Charlotte, and Ben Stitt telephoned to another garage for another car to take the party of men to the city. The car came and the men were carried to the city, and Stitt paid the money he had received from them for this service.

The defendant offered in evidence the proof of loss, signed by plaintiff, in which he stated that the car had been used for his private purposes "and some for hire."

The court charged the jury that if they found that the car was used only twice, in carrying a man to the station at a former time and, on the occasion when it was burned, to carry the hunters to Lincoln County, under the circumstances as testified by the plaintiff, and only twice during a period of a year and a half, it would not be such a renting or using of the car "for passenger service for hire" as is forbidden by section 8 of the policy, and they would answer the issue in respect thereto "No"; but if, on the contrary, they found it was kept for hire and used for hire, for passenger service, they would answer the issue "Yes," as that was a violation of section 8 of the policy of insurance. The jury returned a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

Thad. A. Adams and Cansler & Cansler for plaintiff.
Cameron Morrison and J. H. McLain for defendant.

WALKER, J., after stating the case: We find no material error in the trial of this case, and have concluded, after patient consideration of the facts, that substantial justice has been done, and in accordance with well settled principles of the law. A policy of insurance, it may be said generally, should be interpreted by the rules which are applicable to other written contracts for the purpose of ascertaining and giving effect to the real intention of the parties. We have said that it should be construed strictly against the insurer and favorably to the insured, when there is doubt or ambiguity in its terms, as it is supposed to be prepared by the former. But, however this may be, the object of the contract being to afford indemnity against loss, it should be so considered as to effectuate this purpose, rather than in a way which will defeat it. It should have, from every point of view, a fair and reasonable construction, unless it be so clearly and unambiguously expressed as not to require construction, when its words will be taken in the plain and ordinary sense. *Bray v. Ins. Co.*, 139 N. C., 320; *R. R. v. Casualty Co.*, 145 N. C., 116; 19 Cyc., 655; *W. F. Ins. Co. v. Simons*, 96 Pa. St., 520; *Rogers v. Ætna Ins. Co.*, 95 Fed. Rep., 103; *Ins. Co. v. Kearney*, 180 U. S., 132; *F. C. Ins. Co. v. Hardesty*, 182 Ill., 39; *S. F. and M. Ins. Co. v. Wade*, 93 Am. St. Rep., 870; Vance on Insurance, p. 429.

The clause in this policy, upon the alleged violation of which the defendant relies to defeat a recovery, provides that the motor car thereby insured "will not be rented or used for passenger service of any kind for hire, except by special consent of the company indorsed on the policy." It is apparent, we think, that the parties, by this clause, contemplated, not a single act of renting or using the car for hire, a mere casual or isolated instance, and that, too, without the knowledge or consent of the owner, but something of a more permanent nature. 19 Cyc., 736. This car was not "rented" in the sense of that word as employed in the policy, but it was used by the plaintiff's servant to carry the hunters to the country, but this can hardly be considered as being engaged in the "passenger service." In *Mears v. Humboldt Ins. Co.*, 92 Pa. St., 15 (37 Am. St. Rep., 47), it was held: "We are not disposed to give the word 'use' in this policy the narrow construction claimed for it. It must have a reasonable interpretation, such as was probably contemplated by the parties at the time the contract was entered into. Nearly every policy of insurance issued at the present time contains this condition, or a similar one. What is intended to be prohibited is the habitual use of such articles, not their exceptional use upon some emergency." The case of *S. F. and M. Ins. Co. v. Wade, supra,* furnishes another illustration of this rule. This machine was not kept for the purpose of being rented or used in the passenger service. It was the merest accident that it was used on this occasion, "the other car which had been used for hire not

being in the garage that morning." This is what the witness Ben Stitt said about it, and, besides, when the car was burned the journey had been completed and all the parties had returned to the city by another car, the night before the burning, which was one of those unaccountable accidents, not attributable to any use of the car for carrying the parties to their hunting ground, so far as appears. The hire had been given up and the owner had resumed the possession of his private car, and placed it in the care of his servant to be brought back to the garage. We do not see, from the language of the policy, how such a case could have been intended by the parties as a ground of forfeiture. There was no increase of the risk, which would be incurred by its ordinary and perfectly legitimate use as a private automobile, it being all the time in the possession of the plaintiff's chauffeur, and, at the time of the fire, in his exclusive possession and control. It seems to us that it would be too narrow and rigid a construction of the clause if we should hold that this single act of the chauffeur falls within its prohibition, and consequently involves a forfeiture of the insurance. The carrying of the man, some time before, to the station was, if forbidden, too remote from the time when the car was burned, and is covered by the principle announced in *Cottingham v. Ins. Co.*, 168 N. C., 259.

At the time the car was burned the alleged forbidden use of it had entirely ceased, and its owner, without whose knowledge or consent it was taken out of the garage, had resumed possession and control of it, the tire had been repaired, and he was then engaged in returning it to the garage. The increase of risk by the wrongful use, if there was such, had entirely ceased and determined. It would seem, therefore, that upon this undisputed state of facts the case is brought fairly within the influence of the principle of *Cottingham's case*. Insurance companies have the right to insert in their policies reasonable conditions as to the use of the insured property, and the courts will not, by subtle and ingenious argument, construe away the provisions for their security or deprive them of their full benefit, as safeguards against fraud or negligence, or other unlawful act, nor, on the other hand, will they construe the policy so strictly in favor of the insurer as to make them more than they were designed to be—a protection against such hazards, and consequently a precarious indemnity to the insured. *Gardner v. Ins. Co.*, 163 N. C., 367. They are entitled, both insurer and insured, to a fair, just, and common-sense interpretation of the policy, so that the one may be restrained from doing things calculated unnecessarily to increase the risk, and which are forbidden by the policy, and the other may be held to the full obligation assumed by the contract to furnish a certain and reliable indemnity against loss, the parties being reciprocally held to the same measure of duty and fidelity in respect to the obligations imposed by the insurance contract.

The eighth clause is somewhat obscurely worded, and we must give it that construction which favors the plaintiff, as it involves a question of forfeiture. The words "passenger service," when considered in connection with the preceding words, "rented" or "used," imply more than a single act of renting or using, and refer to the business of carrying passengers for hire. It is susceptible of this meaning, which, under the familiar rule applicable to such cases where the language is not clear and definite, we are authorized to give them.

Being of the opinion that the case is not covered by the eighth clause of the policy, it is not necessary to discuss the other questions argued before us.

No error.

ATLANTIC FRUIT DISTRIBUTORS, INC., v. JOHN R. FOSTER ET AL., TRADING AS FOSTER & CAVINESS.

(Filed 5 May, 1915.)

1. Evidence—Vendor and Purchaser—Fruits—Heated Cars.

In an action to recover the contract price for a car-load shipment of bananas, where the defense is that the plaintiff had failed to perform his contract by not properly loading the fruit and ventilating it in the car, so that it arrived overripe, and not in a merchantable condition, testimony of the defendant's witness familiar with the trade and the packing and shipment of bananas, that it was not customary to give bananas heat in the car, is competent to controvert the plaintiff's evidence that the bananas had been properly loaded in a heated car.

2. Evidence—Vendor and Purchaser—Fruits—Car-load Shipments—Messenger—Appeal and Error—Harmless Error.

Where the defendants resist payment for a car-load shipment of bananas on the ground of improper loading and their receipt in worthless condition, exceptions to testimony of the defendant relating to the duty of a messenger accompanying the shipment becomes immaterial when it appears that no one accompanied the shipment in question.

3. Vendor and Purchaser—Car-load Shipments—Fruit—Preparation for Shipment.

It is the duty of the seller to properly prepare a car-load shipment of merchandise (bananas in this action), and should the shipment arrive to the consignee in a damaged condition for his failure to have done so, he is liable for the proximate damages.

4. Instructions—Unrelated Phases—Appeal and Error—Harmless Error.

Where the action is to recover upon a contract of sale of merchandise, and the issue is made to depend upon whether the plaintiff failed in his duty to properly prepare the merchandise for shipment (in this case bananas), an instruction clear and explicit upon the issue, but obscure upon an irrelevant and unrelated phase of the evidence, is harmless error.

APPEAL by plaintiff from *Devin, J.*, at November Term, 1914, of GUILFORD.

Civil action brought to recover $259.32, the price of a car-load of bananas which the plaintiff alleges it had sold to the defendants. There was a verdict and judgment for the defendant. The plaintiff appealed. The following was the issue: "Are the defendants indebted to the plaintiff, and if so, in what amount? Answer: Nothing."

C. L. Shuping for plaintiff.
Charles A. Hines for defendant.

BROWN, J. The evidence tends to prove that on 21 February, 1914, the plaintiff and defendants entered into a contract for the sale of a car-load of bananas for the sum of $259.32. The defendants admitted the purchase, but alleged that under the terms of the contract the bananas were to have been shipped from Baltimore properly loaded and packed, and that the plaintiff agreed to protect the shipment through to Greensboro, either by messenger or by having the car properly ventilated.

The defendants alleged that the car was improperly loaded and not ventilated; that all the vents were closed, in consequence of which the bananas became overheated en route, and when they arrived in Greensboro they were overripe, decaying, and not in a merchantable condition.

We will notice only such assignments of error as are commented on in the plaintiff's brief. The plaintiffs excepted because his Honor permitted the witness Foster to testify that in shipping bananas it is not the custom of the trade to give a car heat before it is moved, and also in permitting the same witness to testify what the duties of a messenger were, had one accompanied this car.

The plaintiff's witness De Giorgie had testified that the car had been given a certain amount of heat. It was, therefore, competent for the defendants, in order to controvert this testimony, to show, if they could, by one familiar with the trade and the packing and shipping of bananas, that it was not customary to give bananas heat. 17 Cyc., p. 75; Wigmore on Evidence, sec. 2053.

As to the other exception, we regard that as utterly immaterial, as to what a messenger's duties were, since the evidence shows that no messenger accompanied the car.

The plaintiff excepts to the following part of his Honor's charge: "Or, if you find that the plaintiff undertook to and did select the car, and packed the bananas for shipment, and you further find that the plaintiff failed to exercise the precautions usual to the trade in the shipment of bananas, and you find that by reason of such failure the bananas arrived in damaged condition, and the fruit was unmerchantable—if you find those to be the facts, the defendant would not be liable for this shipment of bananas, and you would answer the issue 'No' or 'Nothing.'"

The charge seems to be in accordance with the recognized principles of law regulating the duty of the seller in preparing goods for shipment.

In 25 A. and E. Enc. (2 Ed.), at p. 1072, it is said: "It is the seller's duty to prepare the goods for shipment and to deliver them to the carrier in a merchantable condition, and in delivering to a carrier he must take the usual precautions for insuring a safe delivery to the buyer and for holding the carrier liable in case of loss or damage." Benj. on Sales (16 Am. Ed.), sec. 693; *Bull v. Robinson,* 10 Exch., 342; *Finn v. Clark,* 12 Allen (Mass.), 522.

The plaintiff excepts to the following instructions: "If you find they performed the contract as agreed upon, and that they delivered the amount that was called for in the order, they would be entitled to recover the contract price thereof. If they failed to comply with their contract, the plaintiff would not be entitled to recover anything. There is one view of it—I don't know—there is no evidence to support that—but whether a partial compliance of it, that is as to quantity of goods on the car, but I do not recall any evidence as to the quantity thereon, except the testimony in behalf of the plaintiff that it was $259.32."

As there can be no complaint as to the general instruction in the first part of this charge, the error complained of must be in the language used in the last five lines of it. The language is not very explicit, but it is evidently harmless. The entire charge is a clear expression of the law as bearing upon the rights of the vendor and vendee, and the duty resting upon the former in regard to the preparation of the bananas for shipment.

The case was made to depend upon the question as to whether the plaintiff performed the contract on its part. If the plaintiff failed to do so, then, if the bananas arrived at Greensboro in the condition described by some of the witnesses for the defendant, and such condition arose from a failure of the plaintiff to perform the contract upon its part, then it is plain that the defendants were not required to accept the fruit, and could not be held liable for the contract price.

No error.

HALL FURNITURE COMPANY v. CRANE MANUFACTURING COMPANY.

(Filed 28 April, 1915.)

1. Vendor and Purchaser—Contracts—Warranty Implied—Merchantable.

The law will imply a warranty in the sale of goods that they are at least merchantable or capable of some use for the intended purpose; and where, in the sale of a second-hand hearse, neither of the parties having seen it, the seller expressly states that he will not warrant its "condition," owing to the difference in opinion of the value of such things, but that it will be shipped to the buyer ready for use, etc., it will not affect the implied warranty that the hearse can at least be used as such and that it is not worthless, for the provisions stated by the seller only relate to a warranty of the quality of the article sold, which the law itself excludes in the absence of contractual provision therefor.

2. Same — Entire Contract — Correspondence — Warranty of Quality — Merchantable—Interpretation.

In correspondence leading up to and included in a contract of sale of a hearse, the purchaser wrote the seller that he was in need of a good second-hand hearse, to which the seller replied that he had one at a certain place which he would ship on receiving remittance therefor in a certain sum, and upon receiving the remittance, he held the check and wrote the purchaser that, to avoid misunderstanding, he desired to say he would not guarantee any second-hand vehicles, etc. Upon its arrival the purchaser found it to be worthless. Neither of the parties had seen the hearse up to that time. *Held*, the purchaser may recover upon the implied warranty that the hearse could at least be used as such, but not as to the quality; and the entire contract is not inconsistent with this construction, or as striking out the express provision that vehicles of this kind were not guaranteed by the seller.

APPEAL by defendant from *Devin, J.*, at November Term, 1914, of GUILFORD.

Action to recover $100 which the plaintiff paid to the defendant as the purchase price of a second-hand hearse which was shipped to the plaintiff after the payment of the money and before he had seen the hearse.

The plaintiff refused to accept the hearse because, as he alleged, it was worthless. The contract of sale was entered into by correspondence.

On 27 February, 1913, plaintiff wrote the defendant: "We are in the market for a good second-hand funeral car—light weight preferred." On 1 March, 1913, defendant answered, saying: "We are glad to hear . . . that you are in the market for a good light-weight, second-hand black funeral car. Accordingly, we inclose herewith the following designs: . . . R. J., 710, is a light-weight, second-hand four-column black car which we have stored with one of our customers in Tennessee. It has steel tires on it and the general condition of it is pretty good. . . . Simply inclose your check for which ever one you want." This letter inclosed a cut of R. J., 710.

On 5 March, 1913, plaintiff wrote: "If the 710 you speak of in Fayetteville, Tenn., is in good condition, and like the cut you sent us, and will take any size casket—all complete—we will send you check for $100 for the same."

On 7 March defendant wrote plaintiff: "Of course, you understand we do not guarantee any second-hand vehicles, but from what our representative writes regarding this, we are inclined to think that it is worth every dollar we ask for it. (Price asked was $150.) Your offer now of $100 is considerably less than what we expected to realize out of it, but as we have quite a stock of second-hand cars on hand at the present time, and do not want to bring this one in also, we have decided to accept your offer of $100 cash, and will appreciate your check for that amount at once."

On 10 March plaintiff sent defendant check for $100, and in his letter stated that he was buying R. J., 710, with the understanding "that it is like the cut sent me and in good condition."

On 12 March the defendant wrote the following letter to the plaintiff:

"We are in receipt of yours of the 10th inst., inclosing check for $100 in payment of the R. J., 710, funeral car, which we have stored at Fayetteville, Tenn.

"We note your shipping instructions to forward to the Hall Furniture Company at Leaksville, N. C., via the cheapest route. Before ordering this car shipped to you, however, we would want it thoroughly understood that we do not guarantee condition of any second-hand vehicles. As stated in our last letter, we have not seen the vehicle ourselves, but our representative, who did see it and made the transaction, advises us that, in his opinion, he considered it worth every dollar which we are asking for it. A car that has been out some years evidently does show wear and tear, and if there should be any doubt in your mind as to the value of it, it would pay you to go to Fayetteville, Tenn., to look at this car, in order that there may be no misunderstanding with us regarding its condition. What may be considered by us as being good condition may not agree with your idea of good condition, as there is a great deal of room for difference of opinion as to the value of second-hand hearses.

"We wrote you yesterday that we were informed by our customer that this hearse had a brake on it and steel tires, and we understand that it will be shipped to the buyer with lamps, curtains, pole, and everything ready for use.

"If you, therefore, decide to take it with the distinct understanding that it cannot be returned to us if not satisfactory, and that it is not guaranteed by us as to condition, we will instruct our customer to forward it over the cheapest route, sending bill of lading with freight rate inserted for same to us, which we will, in return, forward to you, together with receipted bill for the amount.

"It is not our intention to deceive any purchaser of goods from us, and, therefore, think it best to write you of the actual conditions, so that if you desire to look into it personally you could do so before making shipment of the vehicle to you.

"We will hold your check until we hear from you as to your decision in the matter."

The plaintiff offered evidence tending to prove that the hearse was of no value and worthless; that there were no wheels on the hearse and that those sent with it were not of sufficient strength to hold it up, because some of the spokes were out and a part of the felloes loose, and that the top was weather-worn and rotten so you could tear it off with the hand, and a part of the woodwork was decayed and in bad shape.

The defendant offered no evidence as to condition of the hearse.

His Honor charged the jury, among other things, as follows:

"The warranty upon which the plaintiff would be entitled to recover, if any, would be inherent to, or, as we say in law, implied by law in the transaction, the implied warranty of identity; that it was the same thing contracted for and that it was fit for the purpose for which it was intended; not that it was good quality, or first quality, or second quality, but that it was the thing contracted for—a hearse—and that it was fit for use for the purpose for which it was intended. So that, upon this issue, after considering all the evidence, if you find from this evidence and by its greater weight that the hearse received by the plaintiff was not the one that was ordered, or that the car received was worthless and unfit for the purpose for which it was purchased—incapable of being used as a hearse; if you find these to be the facts by the greater weight of the evidence, it will be your duty to answer this issue '$100.'

"But, if you find that this car was the one that the plaintiff ordered, and that the condition was not such as stipulated by the plaintiff in his original letter or the cut, yet if it was fit for use for the purpose intended—that is, fit for use as a hearse—if you find these to be the facts, it will be your duty to answer this issue 'Nothing.'

"The burden is upon the plaintiff to satisfy you that this was not the same car that was ordered, specifically, and that when received it was in a worthless condition.

"If you find from this evidence that it was not the same car, but a different car, or that it was worthless and unfit for the purpose for which it was purchased, and incapable of being used as such, you will answer the issue '$100.'"

The defendant excepted.

There was also a motion for judgment of nonsuit, which was denied, and the defendant excepted.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

P. W. Glidewell and Manning & Kitchin for plaintiff.
Brooks, Sapp & Williams for defendant.

ALLEN, J. It was decided in *Ashford v. Shrader*, 167 N. C., 48, that although there is no implied warranty as to quality in the sale of personal property, the seller is held to the duty of furnishing property in compliance with the contract of sale—that is, at least merchantable or salable; and to this we may add that it shall be capable of being used, if intended for use.

This decision and others of like import in our reports (*Medicine Co. v. Davenport*, 163 N. C., 297; *Tomlinson v. Morgan*, 166 N. C., 557;

Grocery Co. v. Vernoy, 167 N. C., 427) rest upon the presumption that both buyer and seller are acting honestly and with no intention to cheat or defraud, and as "the purchaser cannot be supposed to buy goods to lay them on a dunghill," as expressed by *Lord Ellenborough* in *Gardner v. Gray,* 4 Campbell, 143, it will not be assumed that the seller desires to obtain money for a worthless article.

His Honor applied this rule in his charge to the jury, and the defendant, while admitting its correctness in proper cases, insists that it has no application here, because the defendant wrote the plaintiff on 12 March, before the contract was closed, that it would not guarantee the condition of the hearse.

The meaning of the word "condition" is not clear, but it is certain that the defendant was not providing against the sale of a worthless article, because in the same letter he assigns as his reason for not guaranteeing condition the great room for difference of opinion as to the *value* of second-hand hearses, and in the next paragraph says: "We understand the hearse will be shipped to the buyer with lamps, curtains, pole, and *everything ready for use,*" and again, that its representative, who had seen the hearse, advised that it was worth every dollar the defendant was asking for it.

Crediting the defendant with the honesty of purpose declared in the statement in the letter, that "it is not our intention to deceive any purchaser of goods from us," the defendant thought it was selling and intended to sell a thing of value, ready for use and worth $100, but was not willing to guarantee the condition or quality, as there was so much difference of opinion as to the value of second-hand hearses.

As thus understood, the refusal to guarantee condition means only a refusal to warrant as to quality, and although the law writes this into every contract for the sale of personal property—that in the absence of express agreement there shall be no warranty as to quality—it holds the seller to the duty of furnishing an article merchantable or salable or that can be used. If so, why should the obligation of the seller be less because he writes in the contract what the law would place there? In other words, if the law writes into a contract of sale that there is no warranty as to the quality of the goods sold, and still holds the seller to the duty of furnishing an article that is merchantable or salable, or one that can be used, why does not the same duty rest upon the seller when he, instead of the law, writes into the contract that he will not warrant the quality?

It may be said that this gives no effect to the language used, and strikes down one of the terms of the contract; and this would be true but for the correspondence preceding the letter of 12 March.

It appears, however, that the plaintiff wrote the defendant on 27 February that it was "in the market for a *good* second-hand funeral car,"

and that the defendant replied on 1 March, "We are glad to hear, from your favor of the 27th inst., that you are in the market for a *good* lightweight, second-hand black funeral car. Accordingly, we inclose herewith the following designs"; and effect may be given to the refusal to guarantee by relieving the defendant from the possibility of liability upon an express warranty as to quality.

We are therefore of opinion that the charge of his Honor is supported by reason and authority.

There are several exceptions in the record, but all of them relied on by the defendant are dependent upon the question considered and decided.

There was also evidence upon the part of the plaintiff that the hearse was heavy weight, when he had contracted for one of light weight, and that while the description in the design called for steel tires, those on the hearse sent were tires made for rubber, on which there was no rubber.

No error.

T. W. STEMMLER v. RANDOLPH AND CUMBERLAND RAILWAY COMPANY.

(Filed 28 April, 1915.)

1. Railroads—Right of Way—Duty of Company—Combustible Matter—Firing Right of Way.

It is the duty of a railroad company to keep its right of way free from combustible matter, and where in pursuance of this duty the agents of the company burn off the right of way, it is required that they use reasonable care in preventing the escape of the fire to adjoining lands, to the injury of the owners.

2. Same—Negligence—Evidence—Trials—Burden of Proof.

The employees of a railroad company engaged in burning off its right of way left one of their number in charge and proceeded to another place thereon for the same purpose. There was evidence tending to show that the plaintiff in this action had a pile of lumber at the place of the firing, and that the employee remaining to look after the fire, or to see that it did no damage, went away, leaving no one at all at the place, and soon thereafter fire broke out in the plaintiff's lumber and damaged it. *Held*, sufficient evidence of the defendant's negligence to carry the case to the jury, and the circumstances being wholly within the knowledge of the defendant's agents as to whether they used the care required of them in putting out the fire, the burden of proof was on the defendant in that respect.

APPEAL by plaintiff from *Rountree, J.*, at January Term, 1915, of MOORE.

Civil action to recover damages for the destruction of the plaintiff's lumber, caused by fire alleged to have been set out by the defendant's servants on the right of way and communicated to the plaintiff's lumber,

located close to the right of way. At the conclusion of the evidence the court sustained a motion to nonsuit, and the plaintiff appealed.

U. L. Spence, H. F. Seawell for plaintiff.
George H. Humber for defendant.

BROWN, J. The evidence in this case tends to prove that the section foreman and hands of the defendant were engaged in burning off the defendant's right of way near Parkwood; that the lumber of the plaintiff was piled near the right of way at said place, and that the hands fired the débris on all sides of said lumber and then left one William Graffenried, a section hand, to watch the first and protect the lumber, the section foreman and other hands going away to fire other parts of the right of way, and that said Graffenried left the lumber unprotected and went away, and fire soon sprang up in the lumber and most of it was consumed thereby; that there were no other persons about the lumber or along the right of way except the section foreman and hands engaged in firing the right of way. There was further testimony as to the value of the lumber.

We think his Honor erred in sustaining the motion to nonsuit. The defendant was engaged in the discharge of a duty imposed by law of keeping its right of way free from combustible matter. To do so necessitated the burning of its right of way. It was the defendant's duty to exercise reasonable care when it put out such a dangerous agency as fire. We think the burden of proof is necessarily on the defendant to show that it exercised such care and used all reasonable means and precautions to prevent the fire from spreading from its right of way and injuring the property of adjacent owners.

The proof of what the defendant did in order to prevent the spreading of fire from its right of way is almost exclusively within its own knowledge and that of its agents and servants. The plaintiff had no knowledge of when the fire was set out and no opportunity to guard his property. The plaintiff had no knowledge of what precautions were taken by the defendant; therefore, we think it reasonable to hold that the defendant should assume the burden of satisfying the jury that it took all reasonable precautions when its agents and servants undertook to burn off its right of way.

It is said in the Book of Books that "If fire break out and catch in thorns, so that the stacks of corn, or the standing corn, or the field, be consumed therewith: he that kindled the fire shall surely make restitution." Exodus, 22:6.

Inasmuch as the defendant was engaged in the discharge of a duty, we will not hold it to the rule laid down in the Holy Writ, because that would be to make it an insurer; but we think it just and consistent with

well established precedents that in a case of this kind the defendant should assume the burden of proof to satisfy the jury that it used all due precautions to prevent the spread of the fire and injury to adjacent property.

It is incumbent on the company burning off its right of way always to guard the fire along its right of way and to take all proper precautions to prevent its spreading as long as the fire exists. *Brister v. R. R.*, 84 Miss., 33; 33 Cyc., 1329.

There is evidence in this case that the defendant's servants started the fire on the right of way, that it was not properly guarded by them, that it surrounded the plaintiff's property, in consequence of which the plaintiff suffered damage. This evidence may not be sufficient to induce the jury to find the defendant guilty of negligence, but it should have been submitted to them under proper instructions.

New trial.

MRS. G. B. MITCHEM v. D. W. MITCHEM.

(Filed 5 May, 1915.)

1. Instructions—Fraud—Confidential Relations.

In an action to set aside a transaction for fraud arising from the confidential relationship of the parties, an exception to the charge of the court that there was no evidence of such relationship is not sustained when it appears from the charge that the court instructed the jury that the confidential relationship existing would not create the presumption of fraud.

2. Equity — Vendor and Purchaser — Contracts — Rescission—Instructions—False Representations.

In an action to rescind a sale of a business for fraud, the evidence was conflicting as to whether the vendor represented that the net profits were in a certain sum, or that the gross profits were in that amount, the former being the alleged false representations relied upon by the plaintiff, and it is held no error for the judge to have instructed the jury to answer in plaintiff's favor if the representation was made as to the net profits, but for the defendant if made as to the gross profits, with the burden of proof on the plaintiff.

3. Appeal and Error—Assignments of Error—Oral Agreement.

Oral agreements in the Supreme Court upon matters neither embraced in the assignments of error nor referred to in the printed brief will not be considered.

APPEAL by plaintiff from *Shaw, J.*, at September Term, 1914, of GASTON.

This is an action brought for the purpose of rescinding a contract of sale and to recover damages, the plaintiff alleging that she was induced to purchase a one-half interest in a livery business upon the false and

fraudulent representation of the defendant that the net income from the business at the time of the sale was $300 per month and that the property sold was worth $1,400.

His Honor charged the jury that the plaintiff could not sustain her action upon the representation as to the value of the property, to which there was no exception, and the case was tried upon the allegation that the defendant made the representation alleged as to the profits per month.

The plaintiff testified as follows: "My name is Gabrilla Mitchem; the defendant is my brother-in-law, my husband's brother; he advised me on buying some land; told me how much to give, and he had Mr. Mason there to tell me how far to go, and I stopped when he told me to stop. I did not go to him any time prior to the transaction about the livery stable for advice about business affairs, only that time. In reference to this time, I will say he sent up there—Joe came up there and said 'Papa sent after me to come down there; that he wanted me to buy a half interest in the livery stable.' I went down there, and I wasn't there but a few minutes until he got to talking to me about the stable; said he wanted to sell and wanted me and Joe to buy it; said the whole thing was worth $1,400 and wanted me to buy half and wanted Joe to take the other; and I said, 'Dave, I don't know anything about the livery business,' and he said I knew enough, and advised me to take it and to take his advice, and told me my half would be $700, and told me to take it and Joe would take the other half, and in six months it would pay for itself; and I said, 'Have a living out of it, too?' and he said, 'Yes; it does that now, and will do it on,' and I said, 'It will be making right smart money for me out of the little bit I have got.' I had a little bit, and I wanted to put it in something that would make me a little more. He said for me to take that and I could make a living, and it would pay for itself in six months, and Joe said, 'Papa, say twelve months; I think that we can make it in twelve months,' and he said, 'You can make it in six months,' and he named over the horses and buggies and one surry, I believe; said six horses and seven buggies, or seven buggies and six horses, I won't be sure. I did not see the property myself; I told him I would not know if I would go look at them; just took it that they would be what he said. I really never saw them until I moved down there. He said everything was in good condition and would make that money. I paid him $500 at the time, I believe it was. After I got down there I found out I wasn't getting anything, and I asked them where the money was, and they said they wasn't hardly making expenses; and about six weeks after I was down there, between four and six, Dave came through the yard and I said, 'Stop a little bit; I want to talk to you. I am just ruined in this thing,' and he said, 'Why?' and

I said, 'Because what money I got is in this,' and I said, 'Take it back off my hands for $600 and let me go home,' and he just laughed at me and said, 'I don't want it'; and I said, 'Dave, take it back; you can get it off and I can't; take it for $600 and let me go back home; I can live there, and I can't live here,' and he laughed and said he would see if he could not help me get shut of it, and he walked off and left me, and I left it there; left Harvey there, my son, and I come home; I had it to do; was getting in debt for house rents and not making anything. The horses were just worn-out shacks; there was about six; I did not call them valuable; the best horse there only had one eye, the best buggy horse; one was a little faster. I never examined the buggies. Defendant gave his reason for selling out that he wanted to sell it; wanted to send his little boys to school; was going to send Ed. off to school and could not do it and keep the stable. He did not send him to school while I stayed there. Joe and Dave were there every night or every day when Joe run up the pay-roll to find out what they had made. I don't know who got the money; I did not get it; did not receive anything from it."

The jury returned the following verdict:

1. Was the plaintiff induced to purchase a half interest in the livery business from the defendant by means of false and fraudulent representation by the defendant, as alleged in the complaint? Answer: "No."

2. If so, what damage is plaintiff entitled to recover? Answer: "Nothing."

Judgment was rendered in favor of the defendant and the plaintiff appealed, assigning the following errors:

1. The court erred in charging the jury that there was no evidence of confidential relationship existing between the parties.

2. The court erred in charging the jury that unless they found by greater weight of evidence that D. W. Mitchem told Mrs. G. B. Mitchem that he was making a profit of $300 a month they would answer the first issue "No"; that if they found that what he told Mrs. Mitchem was that he was taking in $300 a month, then there would be no false representation, and they would answer the first issue "No."

3. The court erred in charging the jury that plaintiff was not entitled to rescission of contract, for that no offer to return the property had been made; that the property had passed out of possession of plaintiff and she was therefore in no position to restore it and could not have a rescission of contract.

4. The court erred in not allowing the motion of plaintiff's counsel to set aside the verdict and for new trial.

J. F. Flowers and George W. Wilson for plaintiff.
Mason & Mason and Mangum & Woltz for defendant.

ALLEN, J. 1. The first assignment of error is not sustained by the record. His Honor did not charge the jury that there was no evidence of confidential relationship existing between the parties. He did, however, say: "Ordinarily, gentlemen, where this confidential relationship exists as to a transaction passing between the parties, the presumption is that it is fraudulent; but the court instructs you, gentlemen, that there is no evidence of this confidential relation existing between the plaintiff and the defendant that would create a presumption in the case at all," and counsel for the plaintiff admits that, upon the evidence introduced upon the trial, this was a correct statement of the law.

2. We find no error in that part of the charge to the jury embraced in the second assignment of error. His Honor stated clearly the respective contentions of the plaintiff and the defendant, and it appears that the fact in dispute was whether the defendant made a representation as to the net profits of the business or as to the gross profits, the plaintiff contending that she was induced to enter into the contract by reason of the statement by the defendant that the net profit of the business per month was $300, and the defendant contending that his statement was that the gross profit was $300 per month.

This being true, his Honor could not do otherwise than charge the jury that if the representation made was as contended for by the defendant they should answer the issue "No," and this is the effect of the part of the charge excepted to.

His Honor charged the jury, in reference to the contention of the plaintiff, that "The false representation relied upon in this case is that the defendant represented to the plaintiff that this livery business he then and there proposed to sell to plaintiff was paying to him at the time of the sale, and had been prior to that time, the sum of $250 or $300 profit. That is the false representation which is relied upon by this plaintiff—that the defendant made that representation to her. The burden is on the plaintiff to show that he did"; and with reference to the contention of the defendant, that "The defendant contends, gentlemen, that you ought to answer the first issue 'No.' He contends, in the first place, that he made no false representation; he did not tell her—told her nothing from which she could infer he was making a profit of $200 or over; but he testified what he told her was that the income from the business, the gross income, was $300, and he says that is true, and he had been having an income of $300 and that he had been having that on an average for the last two years prior to that time. So he contends, in the first place, that it wasn't any false representation made by him. That he stated the truth, the facts as they were, and that the plaintiff misconstrued what he said, thinking that he meant that the profits were as she contends, when he was saying that it was the gross income."

No exception was taken to this part of the charge, and the case was tried upon the theory that this correctly presented the position of the plaintiff and the defendant.

The question discussed upon the oral argument, as to the correctness of the statement that "there is no evidence that his gross income was not as stated by him," is not embraced in the assignments of error, nor is it referred to in the brief of the appellant.

The charge of his Honor impresses us as being more favorable to the plaintiff than she was entitled to, because upon a careful reading of her evidence it does not appear that she testified that the defendant made any representation as to the profit which the defendant had made or was making out of the business, except she did say, after the statement by the defendant that the business would pay for itself in six months, she asked if she could also have a living out of it, and the defendant replied that it was doing as well as that.

She does not say in her testimony that the defendant stated that he had made and was making $300 per month, and the only representation she says the defendant made was that the business would pay for itself in six months, which is not the representation alleged in the complaint.

It is not necessary to consider the correctness of that part of the charge referred to in the third assignment of error, as the plaintiff cannot in any event have rescission of the contract as long as the finding of the jury upon the first issue stands.

The other assignment of error is merely formal.

No error.

A. A. SHUFORD, JR., v. F. P. COOK AND WIFE, VICTORIA COOK.

(Filed 5 May, 1915.)

1. Debtor and Creditor — Deeds and Conveyances — Evidence — Fraud — Husband and Wife.

The mere declarations of the husband are not admissible as evidence against the wife in an action to set aside a deed made by the former to the latter as fraudulent as to his creditors; and the exclusion of such declarations becomes immaterial when it has been established that there was no fraudulent intent on his part.

2. Same — Intent — Scope of Inquiry.

Upon cross-examination of the plaintiff in his action to set aside a deed made by a husband to his wife, upon the ground of fraud, much latitude is given upon the question of the defendant's fraudulent intent in making the conveyance, which affects the credibility of the witness or tends to assist the jurors; and the scope of the inquiry is broadened to take in all the relevant circumstances and conditions surrounding the parties.

3. Debtor and Creditor—Deeds and Conveyances—Husband and Wife—Fraudulent Intent—Evidence.

In an action to set aside a deed from a husband to his wife as fraudulent against his creditors, it is competent for the former to testify why he had made the deed, when relevant to the question of his fraudulent intent.

4. Same—Principal and Surety—Insolvent Surety—Good Faith.

When one of two sureties on a note has become insolvent and the other surety has paid off the note and brings action against the principal to set aside, as fraudulent against him, a deed he has made to his wife, it is competent for the defendant to testify that before he had made the deed he was informed by the cashier of the local bank that the insolvent surety had property, as affecting the question of his good faith and intent in retaining a sufficient amount of property to meet his obligations.

5. Debtor and Creditor—Deeds and Conveyances—Voluntary Conveyance—Presumptions—Fraudulent Intent—Evidence—Interpretation of Statutes.

In an action to set aside a husband's deed to his wife for fraud as to his creditors, the presumption formerly arising from a voluntary conveyance is removed and the indebtedness of the husband is evidence only from which the intent may be inferred, and a requested instruction is properly refused which requires the defendant to satisfy the jury by the greater weight of the evidence that he retained property fully sufficient and available. Revisal, sec. 962.

6. Debtor and Creditor—Deeds and Conveyances—Husband and Wife—Fraudulent Intent—Evidence—Principal and Surety.

Where the plaintiff seeks to set aside as fraudulent as against himself a deed to lands made by the husband to his wife, upon the ground that he with another became surety on the defendant's note, the cosurety became insolvent, and he paid the note in full, and that the husband had not retained sufficient property to pay his debts at the time of the conveyance, evidence as to the reasonable belief of the defendant that the cosurety was solvent at the time of the conveyance is competent; and as to the value of the property retained by the defendant, it need not have been sufficient to include the full amount of the note, so far as the plaintiff was concerned, he at the time being liable only, as surety, for half thereof.

BROWN, J., dissenting; WALKER, J., concurs in dissenting opinion.

APPEAL by plaintiff from *Harding, J.*, at December Term, 1914, of BURKE.

B. B. Blackwelder, Self & Bagby, and S. J. Ervin for plaintiff.
Spainhour & Mull and Avery & Erwin for defendant.

CLARK, C. J. This is an action to set aside a conveyance by the defendant F. P. Cook to his wife, the codefendant, 14 March, 1908, on the ground that it was voluntary and made in fraud of creditors. The defendant F. P. Cook and plaintiff were indorsers of the note of one J. E. Wheeler, who has since become insolvent, and the note was paid by the plaintiff, who at June Term, 1913, of Burke obtained judgment against F. P. Cook for $1,200 and interest from September, 1909, being the pro rata due by him to the plaintiff.

The defendants denied that the conveyance was voluntary or fraudulent, alleging that F. P. Cook at the time of said conveyance to his wife retained property amply sufficient to pay his then creditors, and further alleged that the property conveyed was purchased for the wife by her father and mother. The plaintiff insisted that neither of these allegations was true, but that the conveyance was executed with the fraudulent intent to hinder, delay, and defeat the creditors of F. P. Cook.

The jury found, in response to the issues submitted, that the defendant F. P. Cook at the time of the conveyance of the said property to his wife retained property fully sufficient and available for the satisfaction of his then creditors, and that while there was no consideration paid F. P. Cook by his wife, the said tract had cost $1,200, of which $1,100 had been paid by her father and mother; that the deed for the same had been executed by the vendor to F. P. Cook, with an agreement that he should hold the title for the benefit of his wife, and that in afterwards making the conveyance to her F. P. Cook had no intent to delay, hinder, or defeat his creditors.

The exceptions of the plaintiff are numerous, but many of them being of the same character, they may be grouped under a few heads. Exceptions 1, 2, 3, 4, 5, and 6 are to the exclusion of certain acts and declarations of F. P. Cook as evidence against Victoria Cook, though admitted as to him. This was competent as against him. *Eddleman v. Lentz*, 158 N. C., 71. Besides, as the jury find that there was no fraudulent intent on the part of F. P. Cook, it is immaterial that this evidence was excluded as to his wife.

Exceptions 7, 8, 9, 10, 11, 13, and 20 were taken on the cross-examination of the plaintiff A. A. Shuford, Jr. These questions bore more or less on the matters in issue, and in cases involving fraudulent intent much latitude is allowed on cross-examination as to inquiries that affect the credibility of witnesses or tend to assist the jurors.

Exceptions 14, 15, 16, 17, 18, and 19 were as to the testimony of the plaintiff on a former trial, and it was competent to inquire fully into such testimony. Neither can exceptions 21, 22, and 23 be sustained, for the scope of the inquiry in cases involving questions of fraud is broadened to take in all the circumstances and conditions surrounding the parties.

Exception 24 is to the testimony of F. P. Cook as to why he made the deed to his wife, but it was clearly competent on the question of intent.

Exceptions 25 and 26 are to the testimony of the defendant F. P. Cook that at the time he made the deed to his wife he knew that Wheeler had certain property, and that the cashier of the bank holding the note, which he signed, informed him of the possession of said property by Wheeler. This was competent as showing good faith and intent as to

the amount of property which should have been retained by him when making the deed to his wife. *Black v. Sanders,* 46 N. C., 67.

Exception 27 was for the refusal to give the following prayer for instruction: "Though you should find from the evidence that F. P. Cook, at the time of the execution of the deed in question, honestly believed that J. A. Wheeler was solvent, financially responsible, and would pay the note given to the bank when it became due, and though you should further find that F. P. Cook retained property fully sufficient and available for the satisfaction of his obligations other than the $2,400 note to said bank, then it would be your duty to answer the first issue 'No,' unless defendants satisfy you by the greater weight of the evidence that F. P. Cook retained property fully sufficient and available to pay the $2,400 note to the bank as well as his other obligations." The plaintiff earnestly pressed this exception, but the act of 1840, now Revisal, 962, provides that the court, where there is any evidence tending to show that at the time of the alleged fraudulent conveyance the grantor retained property fully sufficient and available for the satisfaction of his then creditors, shall submit the question to a jury "with such observations as may be right and proper." The presumption formerly arising from a voluntary conveyance made by a party indebted is thus removed and the indebtedness in such case is to be taken and held, in the language of Revisal, 962, "to be evidence only from which an intent to delay, hinder, and defraud creditors may be inferred." *Hobbs v. Cashwell,* 152 N. C., 183. As against this plaintiff, it was not necessary to retain $2,400, but as to him the liability to be covered was only $1,200.

As to exceptions 28, 32, and 33, the requests of plaintiff's counsel, which were refused, were in substance that the defendant must show that he retained property "fully sufficient and available" to pay all his obligations of every kind, without regard to his true and ultimate liability thereon by reason of the solvency or insolvency of his coöbligors or principals in an indebtedness to which he is surety. While holding that surety debts are to be taken as other debts in reserving property to pay them, *Pearson, J.,* says, in *Black v. Sanders, supra,* "On the other hand, if the principal be entirely solvent, it would seem that it ought to be considered."

So far as the plaintiff is concerned, it was not necessary as against him, as already stated, that the defendants should have retained and set apart $2,400 of property, since his liability to the plaintiff could not exceed his pro rata part, *i. e.,* $1,200.

It having been found on the other issues that the deed to his wife was executed by Cook without any fraudulent intent, and that if he had such intent it was unknown to his wife, and that $1,100 of the $1,200 originally paid for the land had been furnished by her mother and father, and that the deed to F. P. Cook had been executed by the vendor with

an agreement that he would hold the title for the benefit of his wife, much of this discussion is immaterial. But we have considered all the points raised.

No error.

BROWN, J., dissenting: The following is the first issue:

1. Did the defendant F. P. Cook, at the time of the execution of the deed in controversy to his wife, the *feme* defendant, M. V. Cook, retain property fully sufficient and available for the satisfaction of his then creditors?

The plaintiff in apt time requested the court to instruct the jury that "There is not sufficient evidence in this cause to show that F. P. Cook, at the time of the execution of the deed to his wife, M. V. Cook, retained property fully sufficient and available for the satisfaction of his then creditors, and you will answer the first issue 'No.'"

The court refused to give the instruction, and the plaintiff excepted.

I am of opinion, upon all the evidence, the prayer should have been given. Actual insolvency is not necessary in order to render a voluntary conveyance void; for if a person, largely indebted, makes a voluntary conveyance, and shortly afterwards becomes insolvent, that is enough to set aside the conveyance as fraudulent.

Wherever the amount of the property so closely approximates the amount of the liabilities that the conveyance would have a direct tendency to impair the rights of creditors, if they should attempt to force collection by judicial process, the debtor is adjudged insolvent. *Rose v. Dunklee,* 12 Col. App., 403.

The act of 1840, now section 962 of the Revisal of 1905, provides that no voluntary conveyance or gift by one indebted shall be deemed to be void "if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settler."

The property must be available to the creditors owning the debts existing at the time of the gift or settlement. The property must be available when such debts become due and payable, and if payment is refused, the property must be available at the time when the creditor, by the exercise of all due diligence, should reduce debt to a judgment. *House v. Hughes,* 1 Fla., 133; *Edmunds v. Mister,* 58 Miss., 765; *Cock v. Oakley,* 50 Miss., 628; *S. v. Koontz,* 83 Mo., 323; *Pomeroy v. Bailey,* 43 N. H., 118; *Williams v. Hughes,* 136 N. C., 58; *Black v. Saunders,* 46 N. C., 67.

In the last named case it is held as a matter of law that twenty negroes and two tracts of land valued at $7,250 is not property fully sufficient and available to pay debts amounting to $6,848. In the opinion *Chief Justice Pearson* says: "No man would lend money upon such security; he would require property of this description to exceed the debt at least one-third, if not one-half."

Accepting defendant's own valuation upon his property, which should be taken *cum grano salis,* at time he conveyed the property in controversy to his wife, his remaining assets exceeded his liabilities (after deducting homestead and personal exemption) only $610. The bulk of property retained is of a very fleeting and unsubstantial character. Among the assets are mules, cattle, stock of goods, store accounts, binder, buggy, drill and wagon; total value, $2,260. The store accounts alone amount to $400, and there is no evidence that they can be collected.

To my mind, it is perfectly evident that the defendant was practically insolvent when he executed the deed to his wife, and that he did not retain property *fully* sufficient and available within the meaning of the statute.

MR. JUSTICE WALKER concurs in this opinion.

ZEB. COCHRAN v. YOUNG-HARTSELL MILLS COMPANY.

(Filed 5 May, 1915.)

1. Electricity—Trials—Evidence—Nonsuit—Questions for Jury.

Under the rule that the evidence should be considered in the light most favorable to the plaintiff on a motion to nonsuit, the motion should be denied upon evidence tending to show that the plaintiff was employed by the defendant to keep the machinery of its mill in operation, which was run by an electric motor, belts, shafting, etc., under the management and control of the defendant upon the inside of its mill; that the plaintiff was not an electrician and totally ignorant of the operation of the motor; that while replacing a belt, which had fallen from its pulley, according to a method customary and known to the defendant and which he had followed several years without injury, he was severely shocked and injured by catching hold of an iron pipe, which injury would not have resulted if a ground wire without his knowledge had not been removed from the motor.

2. Electricity—Master and Servant—Duty of Master—Safe Place to Work—Trials—Evidence—Questions for Jury.

It is the duty of the master to furnish his servant a reasonably safe place to do the work required of him in view of the dangerous nature of his employment, imposing a high degree of care when a dangerous instrumentality such as electricity is used; and where the employee receives a severe shock, resulting in serious injury to him, while in the discharge of his duties in the way usually adopted and sanctioned and approved by the employer, which shock was caused by the operation of an electric motor or its appliances used in operating the power plant at which he was working, and the employee was ignorant as to the operation of the machine and was not an electrician, his duty being to keep the belts and shafting in operation and in no wise relating to the operation of the motor itself, the facts are sufficient to take the case to the jury upon the issue of defendant's actionable negligence.

3. Electricity—Master and Servant—Trials—Evidence—Res Ipsa Loquitur.

Where there is evidence that the plaintiff, an employee of the defendant in the latter's mill operated by electricity, has received the injury complained of by catching hold of an iron pipe heavily charged with the current; that the plaintiff had neither knowledge of nor duty in connection with the electric motor or appliances, but that these were in the exclusive charge and control of the defendant; that the plaintiff was in the performance of his duties at the time in a manner known to and approved by the defendant, and which had been customary for years, without injurious result, and there being no evidence that the corporation furnishing the defendant with electricity had supplied a heavier voltage on the occasion than usual, the doctrine of *res ipsa loquitur* applies.

4. Electricity—Master and Servant—Duty of Master—Instruction and Warnings—Trials—Evidence—Nonsuit.

An employee of a power plant driven by electricity whose duty it is to see that the machinery is properly kept in operation, but is inexperienced and has no duty in connection with operating the motor itself, has a right to assume that his employer will not needlessly or negligently expose him to danger; and under the circumstances of this case it is held that the failure of the defendant to notify the plaintiff that a ground wire from the motor, used for protection and safety, had been removed, with evidence tending to show that it caused the electricity from the motor to escape into an iron pipe, resulting in the injury complained of, is sufficient to take the case to the jury, and upon a motion to nonsuit, evidence that the injury would likely have occurred if the ground wire had not been removed does not affect the question.

5. Electricity — Master and Servant — Contributory Negligence—Evidence—Trials—Questions for Jury.

Where there is evidence that an employee of an electrically driven plant received a shock to his injury from an iron pipe, while in the discharge of his duty in the usual manner, caused by a defect in the electric motor or appliances, with which he was unfamiliar and which it was no part of his duty to operate, and also evidence that before doing the act whereby he was injured he could first have shut off the current at the switch and prevented the injury, the issue of contributory negligence was properly left to the determination of the jury.

6. Witnesses—Experts—Hypothetical Questions—Appeal and Error—Harmless Error.

The questions asked expert witnesses in this case, supported by the evidence, are held proper; but if otherwise, the error was committed in appellant's favor, of which it cannot complain.

APPEAL by defendant from *Adams, J.*, at November Term, 1914, of CABARRUS.

This action was brought to recover damages for injuries alleged to have been caused by the defendant's negligence. Plaintiff was second hand in defendant's mill, and his duty was to keep the machinery running. An electric motor furnished the power, but he had nothing to do with it or the electric apparatus of any kind. The machines were run by shafts, belts, and pulleys. One of the belts broke about 12 o'clock at night on 19 September, 1913, and plaintiff mended it, and then, by means of cross-pieces nailed to a post, he got upon a sill, underneath which was the motor. In order to steady himself for the purpose of

replacing the belt on the pulley, he caught hold of an iron pipe, and was severely shocked and injured by the current of electricity; one of his legs had to be amputated, and his body was severely burned. There was a ground wire which belonged to the motor, but it had been removed without plaintiff's knowledge. He knew nothing about electricity, and did his work that night in the usual way, as he had done it many times before, and several times in the presence of the superintendent and overseer of the mill, one of them telling him to "keep the frames running and get off all the pounds you can; keep the belts on the pulleys and make the hands work; don't let them go to sleep." He received no instructions to do the work otherwise than he had been doing it, and doing it, too, with safety all the time for several years. He could have stopped the machinery, but it was not customary to do so, nor had he done so, or been told to do so.

Julius Yates testified: "I had been working with the Young-Hartsell Mill, but left there something like a week before 19 September, 1913; I worked at night with Mr. Cochran; my duties were oiling the spinning frame; I worked in the same room with Mr. Cochran; the motor was not stopped at any time, to my knowledge, only when it was lightning; I don't know of any notices around the mill or in that room at the time, informing people that the ground wire had been taken out; I had seen them put this belt on the pulley—I had done it myself." He then described the method of replacing a broken belt, and further testified: "This is the way that Mr. Cochran and I did it; the belt could not have been put on if the machinery was stopped; I don't think you could have moved the belt; I never tried it."

Clarence Price testified that "the pulley has to be operating while you are putting the belt on; it is impossible to put a belt on the pulley unless it is connected with the motor." He also stated that he had seen others put the belt on the pulley just like plaintiff had.

W. A. Honeycutt, after stating that he was an electrical engineer, and had worked as such in several mills, further testified: "My duty in all those mills was to see that all motors were repaired and running safely; I had charge of the motors and electricity in the mills; I worked for the Young-Hartsell Company six years; I quit this mill some seven or eight months before September, 1913; I helped to install the motor in the Young-Hartsell mill; the motor is 100 horse-power motor; one also at the end of the spinning room which I rebuilt; it was never very good from the start; there is a ground wire to all motors; the object of the ground wire is to lead the electricity to the earth; these ground wires are for the purpose of making the motors perfectly safe, and for protection; (witness is here shown a plat and says it represents about the way the motor was attached to the sill); this plat is a very good sketch of the motor."

The plaintiff testified: "I knew how to stop and start up that electric motor; when I wanted to stop the motor I knocked up a switch; I don't know why that stopped the motor; it is all boxed up; I don't know how it works; I guess the power is cut off; I didn't know the motor was out of fix; Bill Rainey claimed to be the electrician; I do not know anything about his attempting to fix the motor; I was there at night every minute; I do not know that the machinery stopped for about three hours that night; the motor never would stop; I didn't know where the ground wire was; one morning when I was lying in bed I heard them talking about it; they said if the ground wire hadn't been off I could not have been hurt; that's how I learned the ground wire was off; I had been in the mill four years, and could not swear which was the ground wire, if the wire was open to view; I didn't see it; there was a whole bunch of wires there; I didn't know where it was; I do not know anything about it; I didn't see the wire; I know, I didn't see any wire; I didn't know there was anything at all the matter with the motor; Rainey had gone there to fix it; I do not know anything about him fixing the motor; he never worked on the motor for me; there may have been things done in the daylight I didn't know about."

Defendant, at the close of the evidence, moved for judgment of nonsuit. The motion was refused, and defendant excepted. The jury found that the plaintiff's injuries were caused by defendant's negligence; that he was not guilty of contributory negligence, and assessed his damages at $5,000. Judgment was entered upon the verdict, and defendant appealed.

M. H. Caldwell and J. W. Keerans for plaintiff.
Wilson & Ferguson and L. F. Hartsell for defendant.

WALKER, J., after stating the case: It is our duty, in construing evidence on a motion to nonsuit, to view it most favorably for the plaintiff, and when thus considered, if there is any evidence to sustain the charge of negligence in this case, the motion necessarily fails. We not only think there is some evidence of such negligence, but that, taken as an entirety, the evidence strongly supports the verdict. A simple narrative of the facts will make this clear. The plaintiff had been engaged in running the machinery at this mill for several years. When a belt dropped from the pulley he had always replaced it in the same way that he did on this occasion, when he was injured, that is, by climbing the improvised ladder described by him as being made of cross-pieces nailed to a post, and getting upon the sill, which was just above the motor and rested upon it. Then he stood and steadied himself by grasping an iron pipe overhead with the left hand, and with the other hand replacing the belt on the pulley. He had done this repeatedly without injury to him-

self, and it was the method he was directed to use by his superiors, and often was done in their immediate presence and in full view of them. The jury have acquitted him of contributory negligence, and we think properly, as we can see no evidence of carelessness on his part, though the court submitted the question to the jury under fair and correct instructions, at least to the defendant. The only question then is, whether there was evidence of defendant's negligence. It appeared, and was, in fact, admitted, that the electric motor had a ground wire, which is always used with such motors "for protection and safety," and for the purpose of conducting the current to the ground. It was intended, it seems, or the jury might have so found, to prevent just such horrible accidents as this one, and if it be conceded that there was no evidence that the motor itself was defective, it still remains that an accident has occurred, which was unusual, and which did not occur when the ground wire was there and when care was used by the defendant. The jury had the right to infer that it was due to the absence of the ground wire. We do not mean to say that this was the only conclusion to be drawn from the evidence, but it surely was one of the legitimate inferences, and if so, it defeats the motion for a nonsuit. The only contention that suggests the opposite conclusion is one based upon the answer of an expert witness on cross-examination, when he said that the pipe might have become "alive," that is, as we understand it, charged with electricity, even if the ground wire was attached to the motor and the latter was in good condition, it depending upon the condition of the ground; for if it was damp, there would be no shock, but if dry and the pipe was a better "ground," there would be a shock, and the person handling it might get as much as 550, 600, 700, or 800 volts, regardless of the presence of the ground wire or the condition of the motor. But if this be so, defendant is then confronted with the principle that it would be evidence of negligence to permit such a condition of danger to exist, when its duty was to furnish a reasonably safe place for its employee to do his work, and especially without giving him some warning of the danger, so that he could avoid it, if possible. We have defined the master's duty, in this respect, to his servant in numerous cases: *Marks v. Cotton Mills,* 135 N. C., 290; *Patterson v. Nichols,* 157 N. C., 407; *Pigford v. R. R.,* 160 N. C., 93; *West v. Tanning Co.,* 154 N. C., 48; *Tate v. Mirror Co.,* 165 N. C., 273. We have held in a number of cases what is the measure of the master's duty towards his servant. Thus we said in *Steele v. Grant,* 166 N. C., 635, that "The duty of the master to provide reasonably safe tools, machinery, and place to work does not go to the extent of a guarantee of safety to the employee, but does require that reasonable care and precaution be taken to secure safety, and this obligation, which is positive and primary, cannot be avoided by a delegation of it to others for its performance. The master's duty, though,

is discharged if he does exercise reasonable care in furnishing suitable and adequate machinery and apparatus to the servant, with a reasonably safe place and structures in and about which to perform the work, and in keeping and maintaining them in such condition as to afford reasonable protection to the servant against injury. *R. R. v. Herbert*, 116 U. S., 642; *Gardner v. R. R.*, 150 U. S., 349; *R. R. v. Baugh*, 149 U. S., 368; *Steamship Co. v. Merchant*, 133 U. S., 375. This undertaking on the part of the master is implied from the contract of hiring. *Hough v. R. R.*, 100 U. S., 213. The rule was stated and applied in *Mincey v. R. R.*, 161 N. C., 467, citing the above authorities, and it has been frequently recognized in many other cases. The difficulty is not in the expression of the principle, but in the application of it to any given statement of facts. But this case does not present any such difficulty, as the facts are simple and practically uncontroverted." And so we say here, that this case is free from any difficulty in applying this elementary rule. The facts are simple and practically undisputed. There must have been a defect in the apparatus somewhere, either in the absence of a ground wire or in the electric motor itself, or in the general plan of construction of the complete machine, else the current would not have surcharged the pipe with electricity, making it a dangerous and deadly piece of the machinery for plaintiff, while performing, in the usual manner, the work assigned to him; and even if this was unavoidable, then it was plainly defendant's duty to warn him of this danger, so as to put him on his guard. The servant has the right to assume that his master will not needlessly or negligently expose him to danger. *Mercer v. R. R.*, 154 N. C., 399; *Britt v. R. R.*, 144 N. C., 253. "If an occupation, attended with danger, can be prosecuted by proper precaution without harmful results, such precaution must be taken, or liability for injuries will follow if they ensue; and if laborers, engaged in such occupation, are left by their employers in ignorance of the dangers incurred, and suffer in consequence, the employers are chargeable for their injuries." *Wood v. McCabe*, 157 N. C., 457. "Generally speaking, an employer is bound to warn and instruct his employee concerning dangers known to him, or which he should know in the exercise of reasonable care for their safety, and which are unknown to them, or are undiscoverable by them in the exercise of such ordinary and reasonable care as in their situation they may be expected and required to take for their own safety, or concerning such dangers as are not probably appreciated by them, by reason of their lack of experience, their youth, or through general incompetency or ignorance; and unless the servant is so warned or instructed, he does not assume the risk of such dangers; but if he receives an injury without fault on his part, in consequence of not having received a suitable warning or instruction, the master is bound to indemnify him therefor." Thompson on Negligence,

sec. 4055; *Norris v. Mills,* 154 N. C., 474. There was evidence of a neglect of duty by the defendant in both respects, especially when it is considered favorably for the plaintiff, as it should be, and it was for the jury to say what were the facts. But as plaintiff's evidence made out at least a *prima facie* case, the nonsuit was properly disallowed. We have recently so fully discussed the doctrine of *res ipsa loquitur* as applicable to cases of this kind that it would seem to be unnecessary to add anything to what has already been said upon the subject. In *Shaw v. N. C. Public-Service Corporation* (this defendant), 168 N. C., 611, we reviewed the authorities, and thus stated the principle: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have control of it use the proper care, it furnishes evidence, in the absence of explanation by the defendant, that the accident arose from want of such care," citing several cases, and among them, *Ridge v. R. R.,* 167 N. C., 510. This rule of the law has been frequently applied to cases involving negligence in the management of electrical machines and appliances, as will appear by reference to *Haynes v. Gas Co.,* 114 N. C., 203; *Mitchell v. Electric Co.,* 129 N. C., 169; *Turner v. Power Co.,* 154 N. C., 131; *Harrington v. Wadesboro,* 153 N. C., 437; *Houston v. Traction Co.,* 155 N. C., 4; *Starr v. Telephone Co.,* 156 N. C., 435; *Hicks v. Telegraph Co.,* 157 N. C., 519; *Ferrell v. Cotton Mills,* 157 N. C., 528; *Benton v. Public-Service Corporation* (this defendant), 165 N. C., 354, and in some of these cases the defendants were held to be liable where the negligence was not as pronounced, or as clear, as it is in this case. It is not suggested that the fault was due to the electric company in supplying too strong a current or more voltage than the defendant's contract called for, even if this would tend to exonerate defendant. The fault was on the inside. The plaintiff knew nothing about the motor or its accessories, whether they were in order or not, but the defendant did know, or should have known by the exercise of proper care. We require a high degree of care in the use of such a deadly agency as electricity. The Court said in *Mitchell's case, supra,* and approved in *Ferrell's case* and *Shaw's case, supra:* "In behalf of human life, and the safety of mankind generally, it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition."

Whether it was negligence on the part of the plaintiff, that is, contributory negligence, not to have shut off the current at the switch before going upon the sill and grabbing the pipe, was plainly a question for the jury, and it was submitted to them with proper instructions. In substance and in principle the case is not unlike *Shaw v. N. C. Public-Service Corporation* (this same defendant), 168 N. C., 611.

The questions to the expert were properly framed and were supported by evidence. *Summerlin v. R. R.*, 133 N. C., 554; *Parrish v. R. R.*, 146 N. C., 125; *Shaw v. N. C. Public-Service Corporation, supra.* Besides, it appears that upon striking a general balance the advantage of all the questions and answers was largely in favor of defendant. If there had been error, no harm would have resulted to defendant.

A careful review of the facts constrains us to sustain the judgment.

No error.

M. F. WOOTEN v. S. R. BIGGS DRUG COMPANY.

(Filed 5 May, 1915.)

1. Actions—Jurisdiction—Motions to Dismiss—Term—Notice.

The plaintiff is not entitled to notice by the defendant entering a special appearance for the purpose of dismissing the action for the want of jurisdiction, and heard at a regular term of the court: and an exception to an order of the trial court dismissing the action, based upon the want of notice, cannot be sustained.

2. Courts—Jurisdiction—Pleadings—Demands—Good Faith.

In order to confer jurisdiction on the Superior Court the amount of the demand in the complaint must be sufficient and related to the facts alleged, and follow as a natural and reasonable conclusion from them; and when it appears therefrom that the largest sum recoverable is within the original jurisdiction of a court of a justice of the peace, it is unnecessary that the demand in the jurisdictional amount was made in "good faith," and the action will be dismissed.

3. Vendor and Purchaser — Jurisdiction—Pleadings—Demands—Contracts—Considerations.

In an action by an architect to recover the contract price of plans and specifications furnished for a soda fountain, fixtures, etc., and the loss of his commissions for the sale thereof, the complaint alleged that the defendant entered into a written contract to pay $100 for the plans, and in the event of another person selling the fountain, etc., he was to retain the $100; that by a verbal cotemporaneous agreement, the defendant was to notify the plaintiff of the time he would receive the bids and favor him in the purchase of the fixtures, which he failed to do and purchased from another, and that if plaintiff had been so notified he would have met competitive prices and netted $750 in commissions. *Held*, the allegations as to the commissions were too vague and uncertain to be considered, and the alleged verbal agreement was without consideration, leaving the amount of recovery $100, which was not within the jurisdiction of the Superior Court.

APPEAL by plaintiff from *Shaw, J.*, at November Term, 1914, of MECKLENBURG.

Action to recover damages, in which the plaintiff filed the following complaint:

The plaintiff, complaining of the defendant, alleges:

1. That he is and was, at the times hereinafter mentioned, a resident and citizen of said county and State, and that the defendant is and was, at said times, a corporation under and by virtue of the laws of North Carolina, engaged in the business of handling drugs, fountain beverages, etc., with its principal place of business in the city of Williamston in Martin County in said State.

3. That on or about 25 September, 1913, the plaintiff and defendant entered into the following agreement, towit: "It is understood and agreed by M. F. Wooten and S. R. Biggs Drug Company, that the said M. F. Wooten is to make blue-print plans, elevation and perspective sketches and detailed specifications for one set of drug fixtures to be purchased by the Biggs Drug Company. It is further agreed that upon receipt of said sketch, plans and specifications, the S. R. Biggs Drug Company will pay the sum of $100 to M. F. Wooten for said services, and then if S. R. Biggs Drug Company should accept the proposition from M. F. Wooten on the fixtures and buy same from him, the money paid ($100) will be credited on the face of the contract, and credit for this amount will be given on the purchase price. In case S. R. Biggs Drug Company buys from another man or firm, then M. F. Wooten will keep said money, and be fully paid for his services." Signed by "S. R. Biggs Drug Company, S. R. B." Signed "M. F. Wooten."

3. That agreeable to the foregoing, the said plaintiff prepared and delivered to the defendant the plans and specifications above referred to, and the same were duly accepted by the defendant, whereby the defendant became indebted to the plaintiff in the sum of $100, as above set forth.

4. That said plans were for the purpose of enabling the defendant to purchase and install certain drug-store fixtures which it proposed to purchase. That plaintiff was a representative of a concern furnishing such fixtures. That by the terms of said contract and a cotemporaneous agreement the defendant contracted and agreed with plaintiff to notify plaintiff when it would be ready to let bids for said proposed purchase of certain drug-store fixtures, and assured the plaintiff that it would favor him in the purchase of said fixtures.

5. That plaintiff is informed and believes, and so alleges, that the defendant has already purchased said fixtures without notifying plaintiff or giving him an opportunity to be present and bid upon said fixtures. That plaintiff is informed and believes, and so alleges, that the defendant has purchased fixtures conformable to said plans from the other parties in the sum of about $3,500, and that if plaintiff had been notified of said purchase by defendants and been permitted to bid on said fixtures, he could and would have met said price and thereby obtained said order, which would have netted plaintiff 20 per cent, or $750.

6. That by reason of the failure of the defendant to comply with its contract and permit plaintiff to participate in said bidding, the plaintiff lost said sale and the commission thereon, and that thereby the defendant is justly indebted to the plaintiff in the sum of $750.

Wherefore the plaintiff prays judgment against the defendant for $750, with interest thereon from the .... day of ....., 1914, and the costs of the action, to be taxed by the clerk.

At the return term of the summons, and after the complaint was filed, the defendant moved to dismiss the action for want of jurisdiction in the Superior Court, upon the ground that the only cause of action alleged in the complaint was for the recovery of $100, which was in the jurisdiction of a justice of the peace, and that the allegations as to the agreement to notify the plaintiff when it would be ready to let bids were not sufficient to constitute a contract which could be enforced.

The motion was continued and was heard at the next succeeding term of court, when the motion was allowed and judgment was entered dismissing the action, and the plaintiff appealed, assigning the following errors:

1. The refusal of the court to compel the defendant to give notice under the special appearance, for the hearing of his motion to dismiss said action for a lack of jurisdiction, and in hearing said motion without notice being given as required by law, over plaintiff's objection.

2. To the judgment as set out in the record, and especially as the court did not find that the demand in the complaint was not made in good faith, but held, either *ex mero motu* or upon a demurrer *ore tenus* by defendant under a special appearance, that the plaintiff could not maintain said action.

Thomas W. Alexander for plaintiff.
Pharr & Bell for defendant.

ALLEN, J. The plaintiff was not entitled to notice of the motion to dismiss the action because the motion was made at a regular term of court. *Hemphill v. Moore*, 104 N. C., 379; *Coor v. Smith*, 107 N. C., 430; *Stith v. Jones*, 119 N. C., 430.

The rule as to motions made in term is stated in *Coor v. Smith* to be that, "While the action is pending no actual notice is required, as all parties are presumed to have notice of all motions, orders, and decrees made in the cause."

Nor was it the duty of his Honor to find as a fact that the demand for judgment by the plaintiff was not made in good faith.

The term "good faith" may be found in many of the opinions of this Court dealing with the question of jurisdiction, but it means more than

an honest purpose. It implies that the demand shall be related to the facts alleged, and shall follow as a natural and reasonable conclusion from them, and in cases like the one before us, to recover damages for breach of contract, the allegations of fact in the complaint must show an enforcible contract.

In *Realty Co. v. Corpening,* 147 N. C., 613, the demand was for $500, when on the facts alleged the plaintiff could only recover $200. The action was dismissed in this Court upon the ground that the Superior Court did not have jurisdiction, the Court saying: "It is too well settled to admit of controversy that the jurisdiction is fixed by the amount for which in the aspect most favorable for the plaintiff judgment could be rendered upon the facts set out."

There are many other cases in our Reports of like import: *Frœlich v. Express Co.,* 67 N. C., 1; *Wiseman v. Witherow,* 90 N. C., 140; *Brock v. Scott,* 159 N. C., 513.

In the last case cited the jurisdiction of the Superior Court was sustained because upon the facts alleged in the complaint the plaintiff was entitled to recover more than $200; but it was pointed out that the court would not be deprived of jurisdiction by reason of the failure of the plaintiff to sustain his entire demand upon the trial or because a part of his claim might be based upon a misconception of a legal principle.

If, therefore, the "good faith" of the demand made by the plaintiff and the jurisdiction of the court are determined by the facts alleged, we must examine the allegations of the complaint to see what cause of action the plaintiff relies upon.

The first, second, and third allegations are sufficient to establish a cause of action to recover $100, but as this amount is not within the jurisdiction of the Superior Court, the plaintiff must rely on his cause of action based on the allegation that the plaintiff promised to notify him when it would be ready to let bids for its proposed purchase of drug fixtures.

Does this allegation and those succeeding it, accepting them as true, establish an enforcible contract between the plaintiff and the defendant? We think not.

The written contract contains no such promise as is alleged, and the plaintiff must rely upon a verbal promise, and no consideration is alleged to support this promise.

The sum of $100 which the defendant agreed to pay under the written contract was for the plans and specifications, and there is no allegation that in fixing this amount the parties were influenced one way or the other by the promise of the defendant to notify the plaintiff when it was ready to let out bids, and therefore this sum cannot be relied upon as a consideration.

The promise of the defendant cannot be supported upon the ground that mutual promises constitute a consideration, because there is no allegation in the complaint that the plaintiff promised to bid, and if the defendant had notified him he could have refused to bid without incurring the breach of any moral or legal obligation.

The promise, as alleged, amounted to no more than an offer which has never been accepted by the plaintiff and which could not constitute a contract until acceptance. It is lacking in the one thing without which a contract cannot be made, and that is, the assent of the parties to the agreement, the meeting of the minds upon a definite proposition. *Elks v. Ins. Co.*, 159 N. C., 624.

Again, the promise is too vague and indefinite.

In *Elks v. Ins. Co., supra*, the Court, quoting from Page on Contracts, says: "The offer must not merely be complete in terms, but the terms must be sufficiently definite to enable the court to determine ultimately whether the contract has been performed or not. If no breach of the contract could be assigned which could be measured by any test of damages from the contract, it has been said to be too indefinite."

If the defendant had notified the plaintiff he could have refused to bid without incurring any liability, or if he had bid the defendant was not obliged to accept, or if the bid had been made and accepted the company represented by the plaintiff could have refused to accept the order for the fixtures. The right of the plaintiff to recover damages, assuming that there was a consideration to support the promise, is altogether conjectural and speculative.

We are therefore of opinion that no cause of action is stated in the complaint, except for the recovery of $100, and as this is not within the jurisdiction of the Superior Court, the action was properly dismissed.

Affirmed.

ROBERT PARKER BY HIS NEXT FRIEND, W. P. PARKER, v. CHARLOTTE ELECTRIC RAILWAY COMPANY.

(Filed 5 May, 1915.)

Electricity—Street Railways—Trials—Evidence—Nonsuit.

In an action against an electric railway company to recover damages for an injury alleged negligently to have been inflicted by it upon a 13-year-old boy, the evidence tended only to show that the plaintiff, with other boys, was upon the defendant's railway bridge, placed underneath which, at a distance of 12 inches, ran the defendant's feed wire; that the plaintiff and others were playing on this bridge, had reached down endeavoring to touch the feed wire, and upon being dared by the others to do so, the plaintiff succeeded in touching the wire and received the injury complained of. *Held*, the consequences resulting in the injury could not reasonably have been foreseen by the defendant and affords no evidence of its actionable negligence.

PARKER *v.* R. R.

APPEAL by plaintiff from *Shaw, J.*, at November Term, 1914, of MECKLENBURG.

Civil action. At the conclusion of the plaintiff's evidence the court sustained the motion to nonsuit. The plaintiff appealed.

Brevard Nixon, E. T. Cansler, J. D. McCall and C. B. Fetner for plaintiff.

Osborn, Cocke & Robinson for defendant.

BROWN, J. This action is brought by the plaintiff, a boy 13 years of age, to recover damages for an injury sustained on account of his touching an electric feed wire of the defendant. The evidence proves that this feed wire ran under a bridge maintained by the defendant over a cut between the city of Charlotte and the village of Hoskins.

The cars of the defendant ran underneath this bridge, and under it are its trolley wires and feed wires. The feed wire is about 12 inches below and underneath the bridge. Several boys were playing on this bridge, the plaintiff being among them. One of the boys reached down through the floor of the bridge, endeavoring to touch the feed wire. He failed to do so, and some one dared the plaintiff to touch it. The plaintiff got down on his knees on the floor of the bridge, reached his hand between the lower railing and floor, and succeeded in touching the feed wire and received a shock, from which he was injured.

Upon this state of facts, we think his Honor properly sustained the motion to nonsuit.

The case differs very materially from *Benton's case,* where an uninsulated wire was allowed to run through the top of a tree which boys were in the habit of climbing. It would seem that the defendant in this case had exercised every possible care in the disposition of its wires and had no reason to expect that a 13-year-old boy would lay down on the bridge and endeavor to touch them.

The injury to the plaintiff evidently resulted from his own independent act in purposely getting the wire within his reach; and under the circumstances such action could not have reasonably been foreseen. *Trout v. Electric Co.,* 84 Atl., 967.

Affirmed.

WATAUGA AND YADKIN RIVER RAILROAD COMPANY v. BLANCHE FERGUSON.

(Filed 5 May, 1915.)

1. **Railroads — Easements—Rights of Way—Payment of Assessment—Right of Appeal—Statutes—Amendments.**

On appeal by a railroad company from the amount of the assessment to be paid the owner of lands for its right of way it is necessary for the company to pay the money into court before building and operating its road [Revisal, secs. 2587, 2567 (4), 2566]; but this does not preclude the right of subsequent legislation to permit by special charter the railroad to appeal without paying the assessment until final judgment.

2. **Same — Final Judgment — Taking of Property—Compensation—Constitutional Law.**

Where a legislative charter of a railroad company requires the company to pay the assessment for the right of way into court before acquiring the right to construct its road thereon pending appeal, and thereafter, and subsequent to the general statutes on the subject, an amendment is made by the Legislature, permitting the company, after the amount of compensation has been fixed by certain proceedings provided for, to enter upon the lands for the purpose of constructing its road without condemnation. It is not a taking of private property prohibited by the Constitution, for the title to the right of way does not pass until final judgment and compensation in accordance therewith.

APPEAL by plaintiff from *Harding, J.*, at August Term, 1914, of CALDWELL.

Squires & Whisnant for plaintiff.
W. C. Newland and Hackett & Gilreath for defendant.

CLARK, C. J. This is an appeal from an order of the clerk approving the assessment of damages by the commissioners condemning the right of way for the plaintiff under its charter, Private Laws 1905, ch. 411.

Revisal, 2587, provides: "If the said company at the time of the appraisement shall pay into court the sum appraised by the commissioners, then and in that event the said company may enter, take possession, and hold said lands, notwithstanding the pendency of the appeal, and until the final judgment rendered on said appeal." The charter of the plaintiff, Private Laws 1905, ch. 411, is practically to the same effect as the provision in Revisal, 2567 (4), which provides that the railroad company may lay out its road not exceeding 100 feet in width and construct the road, making compensation therefor as provided by that chapter for lands taken for the use of the company.

Chapter 11, Private Laws 1913, amends this provision of the charter (sec. 4, ch. 111, Pr. Laws 1905) by adding at the end thereof: "after the amount of such compensation shall have been determined by a proceeding instituted either by said railroad company or by the owner of the lands through which the line of said railroad may run; and said railroad company shall not be required to institute proceedings for the

condemnation of lands prior to the time of entering upon the lands of any person for the purpose of constructing its line of railroad." The plaintiff entered upon the right of way, constructed its road, and is now operating traffic over the same. The defendant relies upon Revisal, 2566, which provides that that chapter (ch. 61) "shall govern and control, anything in any special act of the Assembly creating a railroad corporation to the contrary, notwithstanding, unless in the act of the General Assembly the section or sections of this chapter intended to be repealed shall be especially referred to by number and, as such, shall be repealed." This reference was not made in chapter 11, Private Laws 1913, and on motion of the defendant the court dismissed the plaintiff's appeal upon the ground that, not having paid into court the $800 assessed for damages, the plaintiff could not prosecute its appeal.

It is true that Revisal, 2566, was held valid in *R. R. v. R. R.,* 106 N. C., 16, and *Liverman v. R. R.,* 109 N. C., 52, but said section 2566 of the Revisal is like any other act of the Legislature and is subject to any subsequent legislation, and is only useful in construing the meaning of subsequent legislation when it is doubtful. But it cannot have the effect to prevent antagonistic legislation at a subsequent date.

The amendatory act, chapter 11, Private Laws 1913, authorizes the plaintiff company to enter "upon the lands of any person for the purpose of constructing its line of railroad" without prior thereto instituting proceedings for condemnation. The power of the Legislature to authorize the taking of property under the right of eminent domain without requiring the precedent payment therefor is discussed and decided in *S. v. Lyle,* 100 N. C., 497, and has been approved since. See citations in Anno. Ed. It is there held that compensation must be provided for to warrant the taking, but that it need not precede the taking, and that "the owner is confined to the special remedy given him by the statute under which his property is seized."

In *S. v. Wells,* 142 N. C., 593; *Street R. R. v. R. R., ib.,* 438; *S. v. Mallard,* 143 N. C., 666, the Court held that under the general statute a railroad company had no right to begin the construction of its road until the payment into court of the damages assessed, and that its only right prior to payment thereof into court was to enter on the right of way merely for the purpose of surveying and laying it off, so that the commissioners might assess damages. But, as we have seen, under the amendment to the charter of the plaintiff company by chapter 11, Laws 1913, the plaintiff could construct its railroad before complying with this requirement. This does not deprive the defendant of proceeding to collect the compensation assessed on the final trial, for until payment therefor the title to the easement in her hands does not pass to the plaintiff company.

Reversed.

C. B. FINGER v. J. A. GOODE.

(Filed 5 May, 1915.)

Deeds and Conveyances—Contracts—Interpretation—Intent—Timber—Right to Sell Reserved.

An express written agreement made between the owner of lands whereon timber is growing, and another, whereby the latter was to cut the timber, with certain provisions as to a division of profits, etc., containing the further provision that if the owner "shall sell and convey any and all of the lands herein mentioned and described this contract shall be null and void as to the part sold and conveyed," must be so construed as to effectuate the intention of the parties as gathered from the language employed, and admits only of the interpretation that the owner may at any time during the life of the contract sell off portions of the land, though after the other contracting party had begun to cut the timber.

APPEAL by plaintiff from *Adams, J.*, at February Term, 1915, of LINCOLN.

Civil action heard on case agreed.

On the hearing it was properly made to appear that plaintiff owned and operated a sawmill and defendant owned a body of land lying in Lincoln County, known as the Derr lands, composed of different and coterminous tracts and amounting to about 700 acres, and, in December, 1909, the two entered into a contract in terms as follows:

"This agreement made this 11 December, 1909, between J. A. Goode of the county of Lincoln, State of North Carolina, of the first part, and Calvin Finger of said county and State, of the second part, witnesseth: That the said J. A. Goode does this day contract and agree to let the said C. B. Finger saw with a sawmill and convert into lumber all the timber now standing on the said J. A. Goode lands known as the 'Derr Lands,' containing about 700 acres, adjoining the lands of M. A. Ewing, J. P. Mullen, and others.

"And it is further agreed that each of said parties shall pay one-half of all expense in chopping and hauling all logs to sawmill and delivering all lumber to market, and expense of collecting pay for same.

"And it is further agreed that the sawing of said timber into lumber shall be a rebuttal in full against the timber as it now stands.

"And it is further stipulated and agreed that each of the parties herein named shall receive one-half of all the proceeds derived from the sale of all said lumber. It is further agreed if the price of lumber should decline below $1 per hundred f. o. b. railroad, the sawing shall cease until the price shall again advance to $1 per hundred f. o. b. railroad: *Provided*, if the said J. A. Goode shall sell and convey any or all of the land herein mentioned and described, this contract shall at once become null and void as to the part sold and conveyed.

"It is further agreed that in case the said J. A. Goode shall sell the timber in a body, then and in that case the said C. B. Finger is to cut

and saw said timber at customary prices." Signed and sealed by the parties.

That plaintiff placed his mill on the said lands of defendant and began cutting the timber, and while there defendant sold 377 acres of the land to one J. Smith Campbell, and plaintiff was thereby prevented from cutting the timber on the 377 acres.

The case on appeal further states that it was agreed by the parties that if, upon a proper construction of the contract, defendant had a legal right to sell said 377 acres after plaintiff began to cut the timber, that plaintiff had no cause of action, and the court having intimated an opinion in favor of defendant on the proposition as submitted, in deference to such intimation plaintiff submitted to a nonsuit and appealed.

C. E. Childs, C. A. Jones, S. B. Sparrow for plaintiff.
Ryburn & Hoey, D. Z. Newton, K. B. Nixon for defendant.

HOKE, J. In the recent case of *Gilbert v. Shingle Co.*, 167 N. C., pp. 286-288, it is said to be the accepted rule of construction of written contracts: "That the intent of the parties as embodied in the entire instrument should prevail, and that each and every part shall be given effect if it can be done by fair and reasonable intendment, and that in ascertaining this intent resort should be had, primarily, to the language they have employed, and where this language expresses plainly, clearly, and distinctly the meaning of the parties, it must be given effect by the courts, and other means of interpretation are not permissible," citing *McCallum v. McCallum, post,* 310; *Kearney v. Vann,* 154 N. C., 311; *Hendricks v. Furniture Co.,* 156 N. C., 569; *Bridgers v. Ormond,* 153 N. C., 114; *Davis v. Frazier,* 150 N. C., 447; *Walker v. Venters,* 148 N. C., 388.

In the present case the contract contains express stipulation that "If the said J. A. Goode shall sell and convey any or all of the land herein mentioned and described, the contract shall at once become null and void," and there is nothing anywhere in the instrument to indicate that the force and effect of this provision shall be restricted to the period of time that might elapse before operations were commenced; indeed, there is nothing to indicate that there was to be any such period. The plain and natural meaning of the language is that the stipulation is to prevail through the life of the contract, and, applying the principle of interpretation above referred to, we concur in his Honor's view that, on sale of the land or any part of it, the contract obligations of the parties, concerning the portion sold, should cease.

There is no error, and the judgment of the Court below is

Affirmed.

F. P. MOORE v. F. P. CURTIS.

(Filed 5 May, 1915.)

Judgments—Estoppel—Disseizin—Acquiescence—Limitation of Actions.

Where a judgment is rendered in favor of a party to an action to recover lands it will operate as an estoppel against all claiming under him from the same source; but where such claimant has thereafter entered upon, inclosed, and used the land for the best or only purpose for which it was capable, for the statutory period of twenty years, he will acquire a new estate therein by disseizin and acquiescence. Revisal, sec. 383.

APPEAL by defendant from *Harding, J.*, at November Term, 1914, of CALDWELL.

Squires & Whisnant and M. N. Harshaw for plaintiff.
W. C. Newland and Edmund Jones for defendant.

CLARK, C. J. The land in controversy contains about an acre and it seems is broken and too rough for cultivation, and valuable only for what timber grows upon it and as a woods pasture for stock on adjoining land. Both the plaintiff and defendant claim under grants from the State and mesne conveyances. The plaintiff claims under a grant to his father, Richmond Moore, issued 16 April, 1873, and conveyance to plaintiff by deed 24 April, 1912. The defendant claims under a grant to Thomas Henderson issued 11 October, 1783, upon an entry taken out by Governor Alexander Martin, and mesne conveyances down to defendant. The question at issue in this action is, Which has the better title?

There is testimony that the defendant and those under whom he claims have been in possession of the small tract in dispute for more than twenty years before the beginning of this action, and the plaintiff has not had seizin of the land in dispute within twenty years, unless the possession of the defendant was the possession of the plaintiff, by estoppel, as was held by the court.

There was an action in 1873, by Jesse Moore, under whom the defendant claims, against Richmond Moore, the grantor of the plaintiff, putting in controversy the title to the land now in dispute, and at September Term, 1873, the cause was referred to an arbitrator, whose award was to be a rule of court. Such award was filed at Spring Term, 1874, of Caldwell, and by this award the line in controversy was determined as now claimed by the plaintiff.

We need not consider the objections raised by the defendant to the regularity of that proceeding, for, conceding that it was regular in all respects, it was an estoppel of that date, and the defendant cannot claim under any chain of title reaching beyond the judgment entered in 1874. To that extent it is an estoppel. But there is evidence here of uninter-

rupted adverse possession of the land by the defendant and his grantor, exercising dominion of an owner over the *locus in quo,* claiming it as his own, without protest or interruption from the plaintiff in this action or those under whom he claims. Taking this evidence as true, the defendant has acquired a new estate by disseizin, acquiesced in for forty years by the plaintiff. Such new estate can thus be acquired. *Call v. Dancy,* 144 N. C., 497.

There was evidence that the defendant and his grantor fenced up the *locus in quo,* used it as a pasture, and got timber from it, barn lumber, and firewood. The land being unfit for cultivation, such use of it was evidence of adverse possession, which should have been submitted to the jury, for it was evidence of an appropriation of the land for the purposes for which it was best, if not solely, adapted. If the jury had passed upon the question and found that such possession was adverse and continuous for more than twenty years prior to the beginning of this action, the plaintiff could not recover. Revisal, 383.

The court below, however, instructed the jury that in view of the finding of the jury to the third issue, *i. e.,* that the line had been established by the proceeding and judgment in 1874, the court held as a matter of law that the jury should respond to issues 6 and 7 (which the jury had left unanswered) that the defendant had not been in possession of the land under colorable title for seven years next preceding the commencement of this action, nor had held it adversely for more than twenty years prior to the commencement of this action.

The court evidently was of opinion that the proceeding in 1874 having adjudicated and settled the line, as between the parties under whom the plaintiff and defendant respectively claim, that such adjudication was an estoppel, and that the defendant could not set up possession since contrary thereto, however long continued. The evidence of such possession should have been submitted to the jury.

Error.

JANE HUNTLEY v. T. C. MCBRAYER.

(Filed 12 May, 1915.)

1. Deeds and Conveyances—Conditions Subsequent—Interpretation.

If it be doubtful whether a clause in a deed is a covenant or a condition, the courts will incline against the latter construction, for a covenant is far preferable to the tenant; yet deeds are nevertheless construed to effectuate the intention of the parties where construction is permissible, and where the intention to create an estate upon condition is clear, the law will so construe the deed.

2. Same.

Where the conditions expressed in a conveyance of land is not necessarily required to precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate, or if from the nature of the act to be performed and the time required for its performance it is evidently the intention of the parties that the estate shall vest, and that the grantee perform the act after taking possession, then the condition is subsequent.

3. Deeds and Conveyances—Support of Grantor—Conditions Subsequent.

A conveyance of land made in consideration of support and maintenance so long as the grantor shall live, and if the grantee should fail to comply with his part of the agreement, then the deed to be void and of no effect, with provision that the grantor remain in possession for his life, is construed to be made upon condition subsequent.

4. Same—Termination of Estate—Evidence.

Where a deed made upon consideration of support of the grantor is sought to be terminated upon the ground that the condition subsequent had not been performed by the grantee, it must clearly appear that there has been a substantial failure by the grantee to perform his covenant; and evidence that some demand not stated was made by the grantor upon the grantee is insufficient.

APPEAL by plaintiff from *Justice, J.,* at August Term, 1914, of RUTHERFORD.

This is a proceeding for partition of land, in which defendant pleaded sole seizin. William Henson, who once owned the land, and his wife, Jane Henson, under whom plaintiffs claim as heirs, conveyed the land to their sons, William A. and Jason Henson. William Henson died in 1885 or 1886, and Jason Henson died eleven years ago. William A. and Jason Henson and their mother, Jane Henson, after the death of her husband, conveyed the land to C. M. Robinson, and defendant claims under him. Defendant and those under whom he claims have held the possession since the date the deed was executed in 1885. This suit was brought in June, 1914. The deed of 1885 conveys the land in fee, with this restriction: "For and in consideration that the parties of the first part are both old and frail, and the parties of the second part agree and bind themselves to see that they are maintained and properly cared for as long as they or either of them live (then follow words of conveyance and the habendum and warranty clauses). . . . But if the parties of the second part should fail to comply with their part of the agreement, this is all void and of no effect. The parties of the first part are to retain possession of said land as long as they or either of them live."

There were certain facts agreed upon or admitted by plaintiffs, and, among others, that they have no proof that there was any violation of the agreement to support and maintain William Henson during his life, or that he made any demand on the grantees, but they proposed to prove that Jane Henson made a demand and the grantees failed to respond,

though it is not stated for what the demand was made, nor does it appear what was its nature or extent, or at what time the demend was made. There was no offer to prove that the grantees or their assignees had actually failed to support Jane Henson. The court intimated the opinion that plaintiffs could not recover, whereupon, in deference to this intimation, they took a nonsuit and appealed.

Robert S. Eaves, Ryburn & Hoey, and Quinn, Hamrick & Harris for plaintiff.

Tillett & Guthrie for defendant.

WALKER, J., after stating the facts: We are of the opinion that the words of the deed create a condition subsequent. No precise words are required to make a condition precedent or subsequent. The construction must always be founded on the intention of the parties. If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may be as well done after as before the vesting of the estate, or if from the nature of the act to be performed and the time required for its performance it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act, after taking possession, then the condition is subsequent. 20 Barbour (N. Y.), 455. The effect of the deed, therefore, was to vest the fee simple of the estate in the grantees, subject to be defeated by a neglect or refusal to perform the condition. It is true that such conditions are construed strictly against the grantor, as they tend to defeat estates, but the construction should be conformable to the letter and obvious intent of the grant, and if there is only one construction which will give effect to all the words of the instrument, it will, of course, be followed. 13 Cyc., 687, 688. The meaning of this deed is clear that the grantees shall see to the maintenance and proper care of the grantors during their joint and several lives, and, failing to do so, that the deed shall be "void and of no effect." We have recently discussed the principles applicable to conditions of this sort in deeds, and it would be useless to repeat what is there said. *Britton v. Taylor,* 168 N. C., 271.

The only question we need consider here is whether there was a sufficient offer to prove facts that would show a violation of the condition. It is stated in the facts admitted that a demand was made by Jane Henson upon the grantees, but we are not informed as to its terms, so that we cannot see that it was of a kind to put the grantees in default if they did not comply with it. This would be very indefinite proof, and a wholly inadequate admission upon which to declare a vested estate forfeited for breach of a condition. It must appear clearly that there has been a substantial failure to perform the covenant for support before

the power of the court will be exerted to put an end to the estate conveyed and return it to the grantor.

It is unnecessary to decide as to the legal effect of the deed executed by Jane Henson upon the condition and the right to reënter for its breach, she being the only beneficiary injured by the alleged nonperformance of the grantees. The deed is not before us, and we will not venture a guess as to its contents. A conveyance of the premises by the grantor to a stranger has been held as operating to extinguish the grantor's rights in certain cases. 13 Cyc., 707, and note 96, and cases cited; *Berenbroick v. St. Luke's Hospital*, 23 Hun. (N. Y. Appellate Div. Supreme Court), 339 (*s. c.*, 48 N. Y. Suppl., 363, and 155 N. Y., 655). But we do not decide the question, for the reason stated, as it is sufficient to hold that, upon another ground, the intimation of the court was correct, and the nonsuit will not be set aside.

No error.

MRS. LILLIAN L. KIVETT v. S. J. GARDNER.

(Filed 5 May, 1915.)

1. Tax Deeds—Seals—"Color"—Irregular Deeds—Limitation of Actions.

Sheriff's deed made to lands bought in by the county at a sale for taxes purporting to convey the lands is color of title for the purchaser from the county, though lacking a seal, and the purchaser's sufficient possession thereunder will ripen into an indefeasible title. *Semble*, the purchaser's possession for three years under an irregular sheriff's deed would be sufficient. Revisal, secs. 2909, 395.

2. Tax Deeds—Sales—Purchased by County—Foreclosure—Interpretation of Statutes.

A county may become the purchaser of lands at its sale for taxes without resorting to foreclosure. Revisal, sec. 2905.

APPEAL by plaintiff from *Connor, J.*, at November Term, 1914, of HARNETT.

Civil action of trespass, involving, also, an issue as to title.

There was evidence tending to show that in 1824 Alex. McKay, sheriff, conveyed the land in question to Neil McNeill, Sr.; that he died, leaving two children, Archibald McNeill and Caroline Turner; that plaintiff is daughter of Archibald and that she has acquired the interests of the other children and grandchildren, descendants and heirs at law of Neil McNeill; that the land was listed for taxation as the property of these heirs, or some of them, in 1895 or '96; that the land was sold for taxes in 1897 and a paper-writing was executed, purporting to be in pursuance of such sale, in terms as follows:

Whereas at a sale of real estate for the nonpayment of taxes made in the county aforesaid on 3 May, 1897, the following described real estate, towit, 100 acres of land in Black River Township, adjoining the lands of S. J. Gardner, H. A. Williams, and C. C. Barbee estate, it being bid off to the county of Harnett, it being the last and highest bidder, for the sum of $10.66 tax and $3.69 cost and interest, making $14.35; and whereas the same not having been redeemed from sale, and it appearing that the holder of the certificate of purchase of said real estate has complied with the laws of North Carolina, necessary to entitle him to a deed of said real estate: Now, therefore, know ye, that I, J. H. Pope, sheriff of said county of Harnett, in consideration of the premises and by virtue of the statutes of North Carolina in such cases provided, do hereby grant and convey unto Alex. Stewart, his heirs and assigns forever, the said real estate hereinbefore described, subject, however, to any redemption provided by law.

Given under my hand and seal, the 6th day of June, Anno Domini.

J. H. POPE, *Sheriff.*

That defendant had acquired, by proper conveyances, the interest of Alex. Stewart, the purchaser.

His Honor, having held that this paper was inefficient to convey the title, admitted the same as color of title, and thereupon defendant offered evidence tending to show that not long after the execution of the paper Alex. Stewart had taken possession of the property, claiming to own the same under the above instrument, and that he and his grantees had held it under this and the conveyances since made for more than seven consecutive years next before action brought, and apparently more than ten years; that none of the deeds made by Stewart and his successors in interest bore date more than seven years before suit; only the paper-writing above set out bearing such date.

On issues submitted, there was verdict for defendant. Judgment, and plaintiff excepted and appealed, assigning for error chiefly that the paper-writing in question was not good as color.

J. R. Baggett, Winston & Biggs for plaintiff.
J. C. Clifford, Charles Ross for defendant.

HOKE, J. Color of title has been defined with us as "a paper-writing, usually a deed, which professes to pass the title, but fails to do so" (*Knight v. Roper Lumber Co.*, 168 N. C., 452), and we are of opinion that the instrument under which defendant claims comes chiefly within the words and meaning of the definition. It is urged for plaintiff: (1) That a tax deed, void for noncompliance with the statute, may not constitute color. (2) That in any event the present instrument is not properly color, for lack of a seal. But the first position has been

resolved against the plaintiff in *Greenleaf v. Bartlett,* 146 N. C., 495, and the second in *Avent v. Arrington,* 105 N. C., pp. 377-392, cited, with approval, at the present term, in *Knight's case, supra,* and in *Gann v. Spencer,* 167 N. C., 429.

True, we have held in several cases coming under the former law that when a county bid in land it acquired only the right to foreclose (*Wilcox v. Leach,* 123 N. C., 74), and that when it attempted to convey the title without foreclosure, the conveyance was void (*Smith v. Smith,* 150 N. C., 81), but none of these decisions affect the doctrine of adverse possession under color of title where, as in this case, it is made to appear that the sheriff has executed a written instrument purporting to convey the land in fee, and the grantee, claiming as owner under it, has taken and held possession adversely for more than seven and even more than ten years, according to the testimony.

Regarding defendant as a purchaser under an irregular sale for taxes, it would seem that three years adverse occupation, under a sheriff's deed, is all that would be required. Revisal, secs. 2909 and 395; *Layman v. Hunter,* 123 N. C., 508.

It may be well to note that, under the present law, Revisal, sec. 2905, a county purchasing land for taxes may take a deed therefor without resorting to foreclosure (*McNair v. Boyd,* 163 N. C., 478), and this case holds, too, that it is only when the owner has been in possession that the ordinary statutes of limitations do not operate against him.

We find no error to plaintiff's prejudice in the proceedings below, and the judgment in defendant's favor is affirmed.

No error.

W. M. RITTER LUMBER COMPANY AND HAZEL LUMBER COMPANY v. MONTVALE LUMBER COMPANY, J. E. COBURN, AND JOHN PROCTOR.

(Filed 24 May, 1915.)

1. State's Lands—Grants—Surveys—Lines and Boundaries—Extrinsic Evidence.

The principle applied to the construction of grants of land from the State, or by deed, that the actual location of a line made before or contemporaneously in a survey will control a variance made in the description of the grant or deed, does not obtain unless the line has been marked and cornered for the purpose of a correct description in the grant or deed, and then only when the line marked is so connected with the deed, either by intrinsic or extrinsic evidence, as to create a presumption as to the intent of the grantor that it should be one of the boundaries.

2. Same—Intent.

Where the application of the principle is permissible to show by parol evidence that the lines described in a State's grant of lands is not in con-

formity with the lines of a survey made in contemplation of the grant, the vital question is the intent of the grantor, and the rule admitting parol evidence should be administered with caution and not carried beyond its well defined limits of serving only to locate the land intended to be conveyed by operating to aid the description contained in the deed.

3. Same—Corners—Conduct of Parties.

In order that the line of a survey may vary the description given in a grant of land, it is required that it should have been run and marked before the execution of the deed or cotemporaneously therewith, and intended by the parties as one of the lines of the lands to be conveyed, and this intention must be clearly inferred from the conduct of the parties in regard thereto, the intention being as essential as the fact that the line was surveyed and a corner made.

4. Same—Triangulation.

Where the parties in an action for lands claim respectively under a junior and senior grant from the State, and the controversy depends upon the location of the dividing line between the two grants, represented on the map by lines from an admitted beginning point, A, the one claiming it to be from A to B and other from A to D, and it appears that the line from A to D was too difficult of survey, and the parties established it by means of triangulation, that is, by running from A to B and then to D, the land in controversy lying within the triangle A, B, and D: *Held*, that it being the intention of the parties that the true line should run from A to D and that the line was partly run from A to B, and a corner made at B was only for the purpose of ascertaining the former line, by the stated method, for the purposes of the description in the grant, the intention of the parties will control the call in the grant for a line from A to B, and especially when the latter is coupled with a call for the line of another tract, which is well established and also is in conformity with other points or corners given in the grant.

5. State's Lands — Grants — Extrinsic Evidence—Natural Boundaries—Conflicting Calls—Interpretation.

Where it is the evident purpose of the grant of land, as gathered therefrom, that one of its lines shall coincide with the line of B and run therewith to his northeast corner, and corner there at a sugar maple, which line and tree are definitely ascertained and located, it may not by legal interpretation be made to run beyond to a given, fixed, or natural boundary, as in this case, to the "intersection of the head of Defeat Ridge with the Tennessee line," for such would violate the evident intention of the parties, and the language should be construed as if it read, "cornering at B's northeast corner, supposed to be on the Tennessee line at the head of Defeat Ridge" (*Cherry v. Slade*, 7 N. C., 82, cited and applied); and it is *Further held*, that the mere understanding of the parties, without more, as to the location of B's line and northeast corner, cannot control the call, as an actual or practical location of the line.

6. Appeal and Error—Reference—Findings.

The findings of a referee, confirmed by the judge, will not be disturbed on appeal when there is evidence to support the findings.

7. Deeds and Conveyances—Evidence—Declarations—Surveys.

Declarations of a person, in favor of his own interest at the time, as to the location of a divisional line or boundary of lands are incompetent evidence as to those claiming under him, and in this case it is held that certain other of his declarations concerning that line were properly limited by the court to what was actually done on the survey.

8. Deeds and Conveyances—Evidence—Declarations—Interests.

Where the declarant has parted with his interest in lands, what he may thereafter say about the lines and boundaries cannot be used against those claiming under him, irrespective of the question of *litem motam.*

9. Evidence—Depositions—Testimony of Witness—Effect.

Depositions taken in a cause, which have been destroyed before they were opened and passed upon, are not competent as evidence (Revisal, sec. 1652); nor can a witness testify as to their contents, especially where he is not able to give their substance, but merely the impression they made upon his mind.

10. Evidence—Boundaries—Appeal and Error—Harmless Error.

Held, in this case, that certain testimony of a witness as to line trees upon a boundary of lands in dispute was not sufficiently definite; and were it otherwise, its exclusion would not be reversible error.

11. Evidence—Declarations—Attorney and Client.

The declarations of an attorney respecting the boundaries of his client's land are not binding upon his client, and incompetent as evidence in an action to determine them.

12. Evidence — Deeds and Conveyances — Grants—Copies—Lost Originals—Search—Interpretation of Statutes.

A duly certified copy of the registry of a grant is competent evidence without the necessity of accounting for the nonproduction of the original (Revisal, sec. 988), and if by affidavit a material variance between the copy and the original in such entry is suggested, the court by rule or order may require the production of the original of such deed, in which case it must be produced or its absence duly accounted for according to the course and practice of the courts, which was sufficiently done in this case.

13. Evidence—Rejected Instructions.

It was incompetent, in this case, to show that the court refused certain instructions in another suit, the same being *res inter alios acta.*

14. Evidence—Junior Grants—Prior Surveys—Boundaries.

While the description in a junior grant may not be evidence of the location of lines and boundaries of a senior grant, the rule does not apply when the survey to establish the line in dispute was made prior to the date of the senior grant; and in this case the map and certificate of survey were properly admitted as evidence in corroboration.

15. Deeds and Conveyances—Corners—Declarations.

Where the location of a certain corner of lands is relevant and material to the controversy, testimony as to a conversation between a witness and others in relation thereto was properly excluded where the witness could not name those present at the time or give the substance of what was said, but only the impression on him.

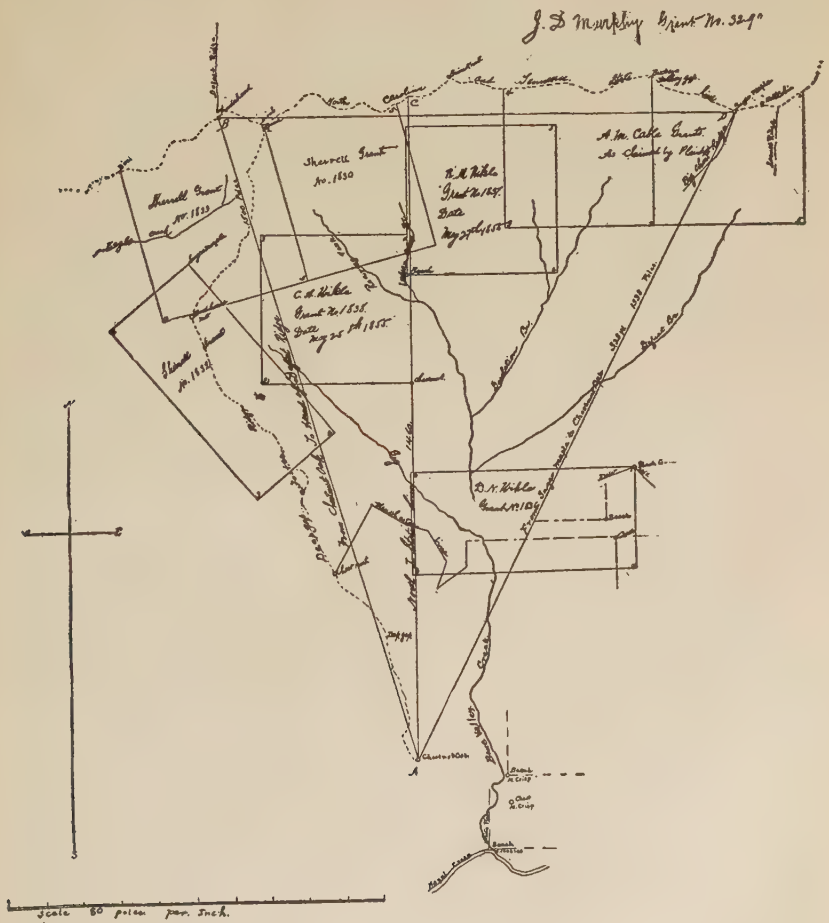
BROWN, J., dissenting; CLARK, C. J., concurring in the dissenting opinion.

APPEAL by both parties from *Carter, J.*, at Special June Term, 1914, of SWAIN.

This action was brought to quiet the title to a large tract of land in the county of Swain, formerly Macon, on the waters of Hazelnut Creek, and alleged to be covered by a grant of the State to W. L. Love, and for damages on account of a trespass upon said land by the defendants. The

case was referred to Hon. J. D. Murphy, who filed a report, which was reviewed by Judge Carter upon exceptions. We cannot do better than insert here an extract from the findings, showing the contentions of the parties:

"The plaintiffs claimed the land in controversy by mesne conveyances under State Grant No. 3290, issued to W. L. Love, assignee of B. L.


J. D. Murphy Grant No. 3290
Sherrell Grant No. 1830
A. M. Cabe Grant
C. A. Hibbs Grant No. 1858
D. N. Hibbs Grant No. 1105
Scale 80 poles per Inch.

Sawyer, bearing date 3 May, 1872, and recorded in the register's office for Macon County, in Book N, pages 12 and 13, on 18 June, 1873, and also registered in Swain County, in Book O, page 601, on 3 October, 1894. The first call in Grant No. 3290 is as follows: 'On the waters of Hazelnut Creek, beginning at chestnut oak on the trail leading from the mouth of Sugar Fork Creek to the Deep Gap, beginning and run-

ning with Col. T. D. Bryson's line 1,800 poles north to the Tennessee State line at the head of Defeat Ridge, cornering with Bryson's northeast corner.' From the end of the first call the grant runs in a general easterly direction with the top of the Smoky Mountain by various calls to a buckeye on the top of Bald Ridge; thence down the Bald Ridge to a white oak at the high rocks, thence to the beginning. It was admitted that the beginning call of Grant No. 3290 was at the point marked 'A' on the 'Court Map.' The plaintiffs contended that the first line of said grant runs along the Deep Gap or Forester Ridge in a northerly direction to the point on said map marked 'B,' Thunderhead, being at the point where Defeat Ridge runs up to and forms a part of Thunderhead, and that from there it ran easterly with the Tennessee and North Carolina State line, passing the point marked 'Sugar Maple' at 'D' on the 'Court Map,' and thence continuing easterly to the Bald Ridge, some distance east of the sugar maple. The defendants claim title to the land in controversy, under State Grant No. 138, issued to George S. Walker, bearing date 8 March, 1881, and recorded in the office of the register of deeds for Swain County in Book B, page 476, 20 April, 1881. One of the calls in Grant No. 138 extends from the chestnut oak at 'A' on the 'Court Map' in a northeasterly direction to the sugar maple at the head of Big Chestnut Ridge, being the point marked 'D' on the 'Court Map,' and the defendants contended that the first call of Grant No. 3290 must run with this call in the Walker grant from the point 'A' on the 'Court Map' to the point 'D.'

"It was admitted that the line A-D was not actually run and marked (throughout its entire length) before the grant was taken out, but the defendant offered evidence tending to show that the line was actually run and marked for a short distance from the chestnut oak at A in the direction of the sugar maple at D, and for a short distance from the sugar maple D in the direction of the chestnut oak at A; but it was contended by the defendants that the line was ascertained by a method known to surveyors as triangulation and by platting, except as to what had been actually run as aforesaid. By these adverse contentions of parties, the triangle A-B-D-A defines the territory in controversy."

The referee found as a fact that the line A-D was marked for a short distance at both ends, and the court, in its general findings of facts, states that it was marked at its northeast end from the sugar maple at D in the direction of the chestnut oak, the place of beginning at A, the latter being admitted by the parties to be the beginning corner of Grant No. 3290. It was further found that in the survey made under the entries upon which Grant No. 138 was issued, the first line was run from A, at the chestnut oak, to B, at Defeat Ridge, not for the purpose of establishing that as a line of the T. D. Bryson tract, but for the purpose of triangulation, in order to fix the location and length of the line A-D,

that is, from the chestnut oak at A to the sugar maple at D, and this was done because it was represented that between the chestnut oak and the sugar maple the land was covered with thickets and infested with poisonous snakes. The method of triangulation was suggested by the surveyor, and it was adopted as a safe method of determining the line from A to D and as avoiding the dangers and difficulties of making a survey over the land between A and D. Both the referee and the judge have found as a fact that the line of the Bryson tract called for in Grant No. 3290 had been well established, and runs from A to D, and the northeast corner of the tract is at the sugar maple, or D on the map. It is also stated as a fact by the referee and the judge that when Sawyer, by Kelly, surveyor, made the survey for Grant No. 3290, it was intended by them that the line A-D between the chestnut oak and the sugar maple should be the first line of the survey and the tract of land to be granted. The court also found as follows: "In respect of the survey made in 1871 for Grant 3290, the B. L. Sawyer entries, the court finds that said survey began at the chestnut oak at 'A' and was carried to the point 'B' at Thunderhead, the same being the head of Defeat Ridge, *retracing the survey theretofore made in 1867, for the purposes heretofore stated,* and that from the point 'B' upon the second line of said survey the line was run easterly to the point where the Locust Ridge reaches the North Carolina and Tennessee State line, the second line of said survey, following the general course of the second line of the triangle made upon the survey of 1867, as above found, and passing about 102 poles to the eastward of the head of Big Chestnut Ridge. The court finds that B. L. Sawyer was present upon this survey, and that the intention of Sawyer and the surveyor upon said survey was to establish the chestnut oak at 'A,' a corner in the Bryson survey, as the beginning point in said survey, and that the western line of said survey should coincide with the eastern line of the survey of 1867, and that the northwest corner of said last (first) mentioned survey should be identical with the northeast corner of the Bryson survey of 1867. And in respect of both surveys it was found as a fact that the line from 'A' to 'B' was not actually measured, along said straight line, but was measured along the course of Deep Gap, or Forester Ridge, and that a corner was marked at the point where the first and second lines of the triangle made upon the Byrson survey of 1867 intersect at the State line at Thunderhead. Defeat Ridge is located as plaintiff claims, being the ridge going up between the prongs of Little River, in Tennessee, and the head of Defeat Ridge culminates at and with other converging ridges, and forms the easternmost knob of the group of knobs known as Thunderhead, on the State line between North Carolina and Tennessee, the said head of Defeat Ridge being at the point marked 'B' on the official map."

There were other findings of the referee, which were approved by the judge, and should be stated here, viz.: "I further find that B. L. Sawyer knew in 1871, at the time of said survey by M. L. Kelly, that there was no Bryson in line along and up said Deep Gap or Forester Ridge, and he further knew, as marker and guide of the surveying party under T. S. Siler, that the line of T. D. Bryson runs from a sugar maple at the head of Big Chestnut Ridge, at the point marked 'D' on the official map, to the point marked 'A' on the official map. I further find that in 1871, the said B. L. Sawyer knew that the true eastern line of the T. D. Bryson land ran from the sugar maple at the head of Big Chestnut Ridge in a southwestwardly direction to the chestnut oak at the point 'A' on the official map. I further find that the northeast corner of the survey of the T. D. Bryson line is at the sugar maple at the head of Big Chestnut Ridge at the point marked 'D' on the official map."

There are many findings of fact bearing upon the general question as to the location of the "Bryson line" and the first line of the tract described in Grant No. 3290 to W. L. Love, under which the plaintiff claims, but it is not necessary to set them out, as those stated will be sufficient for a clear understanding of the contentions of the parties and the question presented in this appeal.

The referee found with the defendants in the appeal, that the first line of plaintiff's Grant No. 3290 was the one from A to D, and not from A to B, as contended by the plaintiff, and that the plaintiffs are not the owners of the land covered by said grant or of any land west of the said line from A to D, except as stated and decided in the defendant's appeal, but that the defendant Montvale Lumber Company is the owner of the land covered by said Grant No. 3290, with the exception aforesaid, it being also a part of the land covered by Grant No. 138, issued to George S. Walker, and described by metes and bounds in the judgment. The judgment may be referred to for greater certainty.

Both parties appealed from the judgment. We will proceed now to the consideration of the plaintiff's appeal.

Theodore F. Davidson, James H. Merrimon, Fred S. Johnston, and Landon C. Bell for plaintiffs.

F. A. Sondley, A. S. Barnard, A. M. Fry, and W. L. Taylor for defendants.

PLAINTIFFS' APPEAL.

WALKER, J., after stating the case: The right of the plaintiffs to recover depends upon the true location of the first line of Grant No. 3290, that is, as to land described in the grant which is not covered by any of the inside patents. The question as to the effect of the latter upon the rights and interests of the parties is presented by the defendant's appeal, and need not be considered here.

The contention of the plaintiffs is that the first line of that grant should be from A to B, as shown on the court map, while the defendants say that it should be from A to D.

We are satisfied that we cannot adopt the plaintiff's view, unless we hold that what was done by Sawyer and Kelly, when they made the survey in 1871, amounted to a practical location of the first line within the rule laid down in *Cherry v. Slade,* 7 N. C., 82, that where it can be proved that there was a line actually run by the surveyor, which was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land in the patent or deed. But the insuperable obstacle to the application of this rule is that the line must have been "marked and a corner made," and it must also appear that this was done for the purpose of making it a line of the tract of land or a call in the deed, for it is said in *Safret v. Hartman,* 30 N. C., 185, after quoting from *Cherry v. Slade,* as above: "This rule presupposes that the patent or deed is made in pursuance of the survey, and that the line was marked and the corner that was made in making the survey was adopted and acted upon in making the patent or deed, and therefore permits such line and corner to control the patent or deed, although they are not called for and do not make a part of it. Parol evidence being let in for the purpose of controlling the patent or deed by establishing a line and corner not called for, as a matter of course, it is also let in for the purpose of showing that such line and corner were not adopted and acted on in making the patent or deed, because the rule presupposes this to be the fact." It may also be added at this place that the rule was adopted, against the strong but ineffectual protest of the judges long since expressed, for the sole purpose of executing the intention of the parties to the grant, and not to defeat it, and it was under the stress of some "hard case," where a sense of justice prevailed over the long established and safe rule forbidding a written instrument to be contradicted or varied by parol evidence, that the rule was brought into being. But conceding fully its existence, and that it is too firmly imbedded in the law of boundary to be now disturbed, we are admonished that it should be administered with caution and not carried beyond its well defined limits. *Judge Pearson* once said that the rule was "a violation of principle" and should not be extended. *Safret v. Hartman, supra.* We may well say in this case, what was so well said in *Elliott v. Jefferson,* 133 N. C., 207, that the error of the plaintiff lies in a misapprehension of the application of the rule, that in case of a discrepancy a marked line controls the calls in the deed as to course and distance. This rule never applies unless the marked line is so connected with the deed, either by intrinsic or extrinsic evidence, as to create a presumption as to the intent of the grantor. The mere running and marking of a line can never convey the title to land, nor can it take the

place of a deed. At best, it can only serve to locate the land conveyed in the deed, and can operate only in aid of the deed. Admitting that a line is run in contemplation of a deed, it does not bind the grantor, as a different contract may be made or the line subsequently changed. As no title can vest except by the execution of a deed, the vital question is the intent of the grantor at the time of such execution. It was also stated in that case that "Wherever a marked line or other natural object is permitted to vary the description called for in the deed, it is always in presumed furtherance of the intent of the grantor in the execution of the deed. In other words, it is to carry out the true intent of the deed, and never in derogation thereof. This principle is clearly recognized in the authorities cited by the plaintiff himself, as will appear from the following extracts: . . . The doctrine thus laid down is in full accord with the principles enunciated and the cases cited in *Bowen v. Gaylord,* 122 N. C., 816, and is sustained by the general current of authority here and elsewhere. In the construction of all deeds and grants there is one essential object to be kept in view, and that is to ascertain the true intent of the grantor and to give full effect to that intention when not contrary to law. All rules of construction adopted by the courts are simply means to a given end, being those methods of reasoning which experience has taught are best calculated to lead to that intention. Hence, all authorities unite in saying that no rule can be invoked, no matter how correct in its general application, that tends to defeat the intention of the grantor. This doctrine is of such universal acceptance as to require but few citations, more to illustrate its extent than to prove its existence."

So we see that the very foundation of the rule is the presumed intention of the parties to the grant, and the only excuse for it, as it is opposed to the general principle, is that it enables us to ascertain what the intention was in respect of the boundary.

It may be well here to reproduce some of the comments of this Court upon the rule and its application, as what has been thus said is most pertinent to the facts of this case, as found by the able and learned referee and judge. The question as to the extent of the rule and the manner of its application was presented in the oft-cited case of *Reed v. Schenck,* 13 N. C., 415, where *Chief Justice Henderson,* with his usual clearness and acumen, thus refers to the rule: "For many years we have in all cases, I believe, except one, adhered to the description contained in the deed, and it is much to be lamented that we do not altogether. The case to which I allude is where the deed describes the land by course and distance only, and old marks are found corresponding in age, as well as can be ascertained, with the date of the deed, and so nearly corresponding with the courses and distances that they may well be supposed to have been made for its boundaries, the marks shall be taken as the

termini of the land. This is going as far as prudence permits; for what passes the land not included by the description of the deed, but included by the marked *termini?* Not the deed; for the description contained in the deed does not comprehend it. It passes, therefore, either by parol or by a mere presumption. As far as we know, there has been no series of decisions by which the description in the deed is varied by marks, unless they were made for the *termini* of the land described in the deed, or supposed to be so made, and to which it was intended the deed should refer, or to which it was supposed the deed did refer, or rather supposed that the courses and distances correspond with the marks, and that the same land was described, whether by course and distance in the deed or by the marked *termini.*" And in *Baxter v. Wilson,* 95 N. C., 138, *Justice Ashe,* with equal force and clearness, states the object and defines the limit of the rule. He said: "For instance, when there has been a practical location of the land, as when it can be proved that there was a line actually run and marked and a corner made, such a boundary will be upheld, notwithstanding a mistaken description in the deed. *Cherry v. Slade,* 7 N. C., 82. The construction has been adopted by our Court to carry out the intention of the parties when it is clearly made to appear, and to effect that object course and distance will be disregarded if the means of correcting the mistake be furnished by a more certain description in the same deed, and especially will it be so when some monument is erected contemporaneously with the execution of the deed," citing *Campbell v. McArthur,* 9 N. C., 33; *Cooper v. White,* 46 N. C., 389; *Spruill v. Davenport,* 44 N. C., 134, and *Reed v. Schenck, supra.* The rule has received consideration, and its precise limits fixed, in the following cases: *Shaffner v. Gaynor,* 117 N. C., 16; *Fincannon v. Sudderth,* 140 N. C., 246; *Mitchell v. Wellborn,* 149 N. C., 347; *Lance v. Rumbough,* 150 N. C., 19; *Land Co. v. Erwin, Ibid.,* 41; and more recently it has been discussed very fully by *Justice Hoke* in *Clarke v. Alridge,* 162 N. C., 326, citing the principal cases which had been decided up to that time, and by *Justice Brown* in *Allison v. Kenion,* 163 N. C., 582; and they all tend to this general result and agree upon this proposition, that the line thus run and marked, before the deed was executed or contemporaneously with the deed, must have been clearly intended by the parties as one of the lines of the land to be conveyed, and without this intention the mere fact that *a* line was surveyed or even marked will not bring the case within the operation of the rule, unless the said intention can be clearly inferred from the conduct of the parties in regard thereto, the intention being as essential as the fact that the line was surveyed and a corner made. It has grown into one of the maxims of the law that such construction should be made of the language of a deed or other written instrument as is most agreeable to the intention of the parties. The words are not the principal things to be considered, but the intent

and design, which is the chief object to be attained. We cannot alter words or insert others which are not in the instrument, but those that are there should be construed in the way most likely to accord with the intent or meaning of the parties, and we may reject words that are merely insensible. In *Smith v. Parkhurst,* 2 Atl. Rep., 135, *Lord Chief Justice Willes,* referring to these principles of construction, said: "Those maxims, my lords, are founded upon the greatest authority—Coke, Plowden, and Lord Chief Justice Hale; and the law commands the *astutia*—the cunning—of judges in construing words in such a manner as shall best answer the intent. The art of construing words in such a manner as shall destroy the intent may show the ingenuity of, but is very ill becoming, a judge." This idea was never better expressed than in the case of *Walsh v. Hill,* 38 Cal., 281, 287, by *Justice Sanderson:* "In the construction of written instruments we have never derived much aid from the technical rules of the books. The only rule of much value is to place ourselves as near as possible in the seats which were occupied by the parties at the time the written instrument was executed, then taking it by its four corners, read it. This is the main object of all constructions. When the intention of the parties can be ascertained, nothing remains but to effectuate that intention." The same rule has frequently been stated by this Court, and applied in the construction of various kinds of written instruments, grants, deeds, wills, and contracts. *Gudger v. White,* 141 N. C., 507; *Triplett v. Williams,* 149 N. C., 394.

When we look at this case in the light of the foregoing authorities, it is manifest that the findings of the referee and judge withdraw the case from the operation of the rule as to the effect of a line being run and marked at the time the grant was made, as they distinctly find, and as clearly and emphatically as language can express such a finding, that B. L. Sawyer and his surveyor, M. L. Kelly, when they made the survey in 1871 and ran along Deep Gap or Forester Ridge, had no intention of marking the line A-B as a line of the tract of land to be thereafter described in the Grant No. 3290. To use the language of the judge: "In respect of the survey made in 1871, for Grant No. 3290, on the B. L. Sawyer entries, the court finds that said survey began at the chestnut oak at 'A' and was carried to the point 'B' at Thunderhead, the same being the head of Defeat Ridge, *retracing the survey theretofore made in 1867, for the purposes heretofore stated.* . . . The court finds that B. L. Sawyer was present upon this survey, and that the intention of Sawyer and the surveyor, upon said survey, was to establish the chestnut oak at A, a corner in the Bryson survey, as the beginning point in said survey, and that the western line of said survey should coincide with the eastern line of the survey of 1867, and that the northwest corner of said last (first) mentioned surveyed should be identical with the northeast corner of the Bryson survey of 1867." It is then found as a fact that the

line from A to B was not actually measured "along said straight line," but along the corner of Deep Gap or Forester Ridge, a corner being marked at the point where the first and second lines of the triangle made upon the Bryson survey of 1817 intersected on the State line at Thunderhead. There are further findings that B. L. Sawyer knew in 1871, when he and Kelly made their survey, that there was "no Bryson line along and up said Deep Gap or Forester Ridge," and he further knew, at said time, that the line of T. D. Bryson ran from a sugar maple at the head of Big Chestnut Ridge, at the point marked D on the official map to the chestnut oak, at the point marked A thereon, and he consequently knew that this was the eastern line of T. D. Bryson's land, that is, from the sugar maple at D, in a southwestwardly direction, to chestnut oak at A, as the one fact is necessarily to be inferred from the other. It appears also that it was Sawyer who set the compass in 1867 on the Bryson survey and sighted to the sugar maple, which he told the surveying party was at the head of Big Chestnut Ridge. He was the marker, and he marked the chestnut oak so as to indicate the direction from which they had come in reaching it and the direction they would go in leaving, the latter being towards the sugar maple on Big Chestnut Ridge. The marks were three hacks on each side of the tree. Sawyer inquired of T. S. Siler how he could measure the line to the sugar maple without running it, and he was shown how it could be done by a diagram. It is also found that it was the intention that the western line of the Kelly survey of 1871 should coincide with the eastern line of the Bryson survey of 1867, and the the northwest corner of the Kelly survey should be identical with the northeast corner of the Bryson survey. The Bryson northeast corner is at the sugar maple, the point marked D on the map. So it is clear that the line up the Big Gap or Forester Ridge was not run and marked for the purpose of making it a line of the grant to be thereafter issued (No. 3290), but, on the contrary, the intention of the parties was in strict accordance with the express words of the grant, that the line A-D should be one of its lines. We are bound by the findings of fact as made by the referee and judge, as it is not our custom to review them under such circumstances. *Usry v. Suit,* 91 N. C., 406; *Wiley v. Logan,* 95 N. C., 358; *Dunavant v. R. R.,* 122 N. C., 999; *Collins v. Young,* 118 N. C., 265; *Harris v. Smith,* 144 N. C., 439. The findings of fact are conclusive upon us unless it appears that they were not based upon any evidence, or rested upon improper evidence. *Usry v. Suit, supra.* There was evidence to sustain the findings in this case.

But plaintiffs contend that, while the call is for the Bryson line, it also extends from A "1,800 poles north to the Tennessee line at the head of Defeat Ridge, and they insist that the line should go to that place, notwithstanding it is also said that it must begin and run with Bryson's line and corner with Bryson's northeast corner; but we do not

think that this is the proper meaning of the call. The leading purpose and dominant idea is that this line shall coincide with the Bryson line, and if this part of the call is ignored and the line is extended north to the intersection of the head of Defeat Ridge with the Tennessee line, it would violate the evident intention of the parties, as gathered from the deed, that it should corner at D, where the maple stood, and of course stop there, for it could not corner there very well if that was not to be the end of the line. The clear intention of the parties must prevail, and the line must run with that of Bryson's and stop at D, as a corner of the land. It is plain that the parties mistakenly thought, when they inserted the call for Defeat Ridge in the grant, that the northeast corner of the Bryson land was on the Tennessee line at the head of that ridge, but their purpose was to stop at the corner, wherever it should be, the call for Defeat Ridge being descriptive and not locative. The call is to be construed as if it read, "cornering at Bryson's northeast corner, supposed to be on the Tennessee line, at the head of Defeat Ridge." This is a much more reasonable interpretation of the grant than if we should defeat the intention to make "Bryson's line" one of the lines, by running the line along Deep Gap or Forester Ridge to Defeat Ridge, eliminating the primary and principal call, and the law does not require that we should do so. Referring to the "third" of the four rules for locating boundaries which are stated in *Cherry v. Slade*, 7 N. C., 82, *Chief Justice Taylor* said: "This rule is founded upon the same reasons with the preceding ones, the design of all being to ascertain the location originally made; and, calling for another well known line of another tract, denotes the intention of the party with equal strength to calling for a natural boundary, so long as that line can be proved." The case of *Bonaparte v. Carter*, 106 N. C., 534, is pertinent, for there the call was for a small oak, John Edwards' corner, on the side of the creek. It turned out that the Edwards corner was 300 yards from the creek, and the Court, by *Justice Clark*, said: "The side of the creek is not called for as a boundary, but merely as a description of the locality of the beginning point, which is 'a small oak, John Edwards' corner.' If that can be identified, an inaccuracy in the description of the locality will be disregarded. *What* is the beginning point is a matter of law for the court to declare. This he did correctly. *Where* it is, is for the jury to say; and the court so held. The objection is, in effect, that the court did not hold that though 'a small oak, John Edwards' corner,' might be identified, it could not be held to be the beginning corner unless it stood on the bank of the creek. This is not the case where two natural objects, a creek and a marked tree, are both called for, and the question arises which shall govern. The case now presented is where a marked tree is described as located on the side of a creek. Inquiry is, Which shall govern, the tree as actually located, or as described to be located? The

failure of the description may make it difficult to satisfy the jury that the tree claimed to be the 'small oak, John Edwards' corner,' is such. But if the evidence is sufficient to identify it, the inaccuracy in describing the locality as 'on the side of the creek,' when it is 300 yards off, cannot be allowed to vitiate the grant. The exact point has never been decided in this State, but in *Murray v. Spencer,* 88 N. C., 357, the Court intimates that when a marked tree in the line of another tract is called for, and the marked tree is identified, but is not in the line of the other tract, that the tree will be held the true corner, and the misdescription of it, as being in such other line, will be disregarded. And the point is expressly so held by *Judge Story* in *Cleveland v. Smith,* 2 Story, 278." And the same rule was followed in *Fincannon v. Sudderth,* 140 N. C., 246. In *Murray v. Spencer,* 88 N. C., 357, where the conflict was between a tree and the line of another tract, both being called for, it was held to be a question for the jury to determine as to which one was actually adopted. In our case the referee and judge have decided in favor of the line, and it is intimated by *Justice Ruffin* that if the line was well known and its location certain, the preference should be awarded to it, as between the two objects in the call. Physical monuments are generally preferred to other objects in the call, because they are more durable, and in some respects more reliable; but even they will give way to a more certain and definite call in the grant or deed, especially if the intention is clearly manifested that they should not govern or control in ascertaining the location of the land. It was held in *Jamison v. Fopiano,* 48 Mo., 194: "Although monuments will generally prevail over other calls in a deed, yet if, taking the whole deed together, they are apparently erroneous, they will be disregarded. And a boundary may be rejected when it is clear that it was inadvertently inserted, and that a tract with different boundaries was intended to be conveyed. In the construction of deeds words are not the principal thing, but the intent and design of the parties; and, therefore, when there are any words in a deed that appear repugnant to the other parts of it, and to the general intention of the parties, they will be rejected. The evident intention here was to convey the whole Lami tract, and the error of the parties in designating a boundary line ought not to defeat that intention," citing *Gibson v. Bogy,* 28 Mo., 478; 4 Greenleaf's Cruise, 307 and 338, and note; *Thatcher v. Howland,* 2 Metc., 41, and *Bosworth v. Sturtevant,* 2 Cush., 391. "While natural objects and artificial boundaries will generally prevail over course and distance, yet the former will often, from the nature of the case, be compelled to yield to the most inferior call. Everything being equal, the call for natural objects would have precedence, because most durable and less liable to change, and are supposed to be selected as landmarks because of their immutability. This is only true when they are selected as locative calls, and are then

not always absolute; when they are noted in the field notes as mere incidental calls in passing, their reliability is weakened and sometimes rendered wholly worthless. Distances called for between corners to creeks or roads, unless specially designated in such manner as to show the intention to make them locative, are not such, and will not ordinarily have precedence over a call for course and distance. The calls in the Hunt deed for the creek and road are incidental, and unless shown to be intended as locative, should not be so regarded if inconsistent with other locative calls." *Jones v. Andrews,* 72 Texas, 5. See, also, *Lutcher v. Hart,* 26 S. W. Rep., 94; *Page v. Scheibel,* 11 Mo., 167, 187.

It was held in *White v. Luning,* 93 U. S., 514 (23 L. Ed., 938):

"1. As a general rule, monuments, natural or artificial, referred to in a deed control its construction, rather than courses and distances; but this rule is not inflexible; it yields whenever, taking all the particulars of the deed together, it would be absurd to apply it.

"2. If monuments are inconsistent with the calls for other monuments, and it is apparent from all the other particulars in the deed that they were inadvertently inserted, they will be rejected.

"3. Other things being equal, boundaries prevail over courses; but where the corners and distances inclose the identical land in dispute, it would be wrong to let two false boundaries stand, in order to defeat a conveyance."

See, also, 1 Jones on R. P., secs. 382, 383, 384; 2 Devlin on Deeds, 1405, 1406; *Noonan v. Lee,* 2 Black (U. S.), 504 (17 L. Ed., 279); *Shipp v. Miller,* 2 Wheat., 316; *Davis v. Rainsford,* 17 Mass., 207; *Thatcher v. Howland,* 2 Metc., 41; *Parks v. Loomis,* 6 Gray, 472; *Hamilton v. Foster,* 45 Me., 40; *Evans v. Greene,* 21 Mo., 481; *Bass v. Mitchell,* 22 Texas, 285; *Bagley v. Morrill,* 46 Vt., 99; *Atkinson v. Cummins,* 9 How. (U. S.), 485; *Browning v. Atkinson,* 37 Texas, 633; *Barclay v. Howell,* 6 Peters (U. S.), 511.

In *Mayo v. Blount,* 23 N. C., 283, it was said to be "a sound rule of construction that a perfect description, which fully ascertains the *corpus,* is not to be defeated by the addition of a further and false description." *Cherry v. Slade,* 7 N. C., at p. 96, *Henderson, J.; Proctor v. Porter,* 15 N. C., 307; *Shaffer v. Ham,* 111 N. C., 1, at p. 11; *Shultz v. Young,* 25 N. C., 287.

We find it stated in plaintiff's brief that "When a deed sufficiently identifies land by its known boundaries or other means, and then superadds, unnecessarily, to the description, such further description, though inaccurate, will not vitiate the previous and perfect description," citing *Simpson v. King,* 36 N. C., 11; *Mortgage Co. v. Long,* 113 N. C., 126. This is because of the maxim, *Falsa demonstratio non nocet.* If the line should be run from A to D and then extended to the head of Defeat Ridge on the Tennessee line, so as to satisfy both calls (*Clark v. Wag-*

oner, 76 N. C., 463), it would be of no benefit to the plaintiffs, as we understand. But the mention of Defeat Ridge was evidently incidental, and not intended to be locative. It was merely a mistake of the parties as to where the Bryson corner was. As we have seen, "all authorities unite in saying that no rule can be invoked, no matter how correct in its general application, that tends to defeat the intention of the grantor." *Elliott v. Jefferson, supra.* In this case the mistake in the call for Defeat Ridge is corrected by other more certain descriptions in the grant, which is one of the permissible methods of ascertaining what was meant. *Campbell v. McArthur,* 9 N. C., 33; *Ritter v. Barrett,* 20 N. C. (4 D. and B.), 133; *Cooper v. White,* 46 N. C., 389; *Kessam v. Gaylord,* 44 N. C., 116.

There are several facts which tend to show clearly what property was intended to be described:

1. There is no reference in the grant to the Deep Gap or Forester Ridge, but the call is for a course due north to the Tennessee line, and this course is deflected, not to coincide with Deep Gap or Forester Ridge, but with the Bryson line, beginning with it, running with it, and "cornering" with it at its northeast corner, where the maple is. We must, therefore, adopt the latter as the line, or, at least, as a part of the line. *Mizzell v. Simmons,* 79 N. C., 187; *Cansler v. Fite,* 50 N. C., 424.

2. If the call is run with the Bryson line, and stopped at the Bryson northeast corner, the other calls of the grant fit in with it; whereas if run as plaintiffs contend it should be, there are marked discrepancies.

3. The Bryson line was marked, when the first or Siler survey was made, at both of its ends, and has for its northeast corner a maple, which identifies it with certainty.

4. There are subsequent calls in the Bryson survey for physical monuments just as certain and as reliable as Defeat Ridge, and they would not be reached without greatly lengthening lines, if the line is carried to Defeat Ridge. One of them is "700 poles to a beech, where the Locust Ridge reaches the Tennessee line."

It will be conceded, we presume, that the mere understanding of the parties, without more, as to the location of Bryson's line and northeast corner, cannot control the call. *Hough v. Howe,* 22 N. C., 228; *Johnson v. Farlow,* 33 N. C., 190; *Literary Fund v. Clark,* 31 N. C., 63; *Wynne v. Alexander,* 29 N. C., 237; *Sasser v. Herring,* 14 N. C., 340; *Land Co. v. Erwin,* 150 N. C., 41; *Miller v. Bryan,* 86 N. C., 167; *Ingram v. Colson,* 14 N. C., 520; *Patton v. Alexander,* 52 N. C., 603. The call is not from the chestnut oak (at A) to Defeat Ridge (at B), but a very different one, and if you go to Defeat Ridge at all, it must be by way of the Bryson line, and importance must be attached to the fact that it also calls for Bryson's corner as the end of the line. The Bryson line, at the time, had been well established, having one corner at the

chestnut oak (at A) and the other at the maple (at B), with marks on the trees indicating its course. It could easily be identified, and was certainly identified.

There are many exceptions to evidence in the case, but we think they can be so classified as to present but few questions for our consideration.

First. The testimony of the witnesses M. L. Kelly, P. C. Sawyer, and Joseph M. Greer, and any other of the same kind, as to the declarations of B. L. Sawyer concerning the Bryson line, was properly limited by the court to what was actually done on the Kelly survey. The declarations of B. L. Sawyer as to the location of the Bryson line were incompetent, because he was not shown to be disinterested at the time they were made, and, on the contrary, it appears that he was interested at the time of the alleged declarations. *Morgan v. Purnell*, 11 N. C., 97; *Sasser v. Herring*, 14 N. C., 340; *Hedrick v. Gobble*, 63 N. C., 48; *Caldwell v. Neely*, 81 N. C., 114; *Shaffer v. Gaynor*, 117 N. C., 15; *Yow v. Hamilton*, 136 N. C., 357; *Hemphill v. Hemphill*, 138 N. C., 504; *Hill v. Dalton*, 140 N. C., 9; *Lumber Co. v. Branch*, 150 N. C., 240. The declarations of a grantor are not competent in favor of one claiming under him. *Sasser v. Herring, supra.* We need not say whether the evidence is sufficient to show the declarations were *ante litem motam.* It may be said that where the declarant has parted with his interest, what he has afterwards said about lines and boundaries cannot be used against those claiming under him to disparage their title. The same principle applies to the testimony of the witness A. C. Hoffman.

Second. The testimony as to the contents of the deposition of Bent Cook was properly excluded, as the witnesses were not able to give the substance thereof (*Wright v. Stone*, 49 N. C., 516; *Whitemire v. Heath*, 155 N. C., 304), and, besides, the deposition itself was not competent, as it had not been opened and passed upon, when it was destroyed, and never has been restored for that purpose. Revisal, sec. 1652. It may be added that the testimony of Bent Cook as to declarations of Bryson was incompetent, as they were made after Bryson had disposed of his interest, and would disparage those claiming under him. 16 Cyc., 979. The testimony of T. T. Jenkins and T. J. Calhoun was properly excluded, and is governed by what we have already said in regard to the other excluded evidence. Besides, it does not clearly appear when the alleged declarations were made.

Third. The testimony of William Walker as to line trees was not sufficiently definite as to kind of marks or their age, and in other respects was very indefinite. Even if there was any error, it was not sufficiently harmful for a reversal.

Fourth. Testimony as to the acts and declarations of Kope Elias was properly rejected. The relation between George W. Swepson and Elias, as client and attorney, appears to have been severed at the time of the

alleged acts and declarations, by the death of Swepson, and we can see no authority in Elias to bind Swepson by his acts or declarations. It surely did not arise out of their relations as attorney and client.

Fifth. The copy of the grant to George S. Walker, No. 138, taken from the registry, was properly admitted in evidence. By Revisal, sec. 988, it is provided that the registry of a deed, or duly certified copy thereof, shall be evidence in any court of the State, without accounting for the nonproduction of the original, and by sections 1588, 1599, it is further provided that the court may, "upon affidavit suggesting some material variance from the original in such registry, or upon other sufficient grounds," by rule or order require the production of the original of such deed, in which case the same shall be produced, or its absence duly accounted for according to the course and practice of the court. In this case, upon affidavit, *Judge Peebles* ordered that defendants allow plaintiffs to inspect the original grant, No. 138, and the plat and certificate of survey thereto attached, or show to the satisfaction of the court that they had made diligent effort to find them and failed, and on failure to produce the original grant, that they procure and use a certified copy of the same from the office of the Secretary of State. The latter was offered in evidence, and the court found that defendants had never had the originals in their possession or under their control, and that they had made a *bona fide* effort to produce the original papers by doing the things and making the inquiries and search detailed in the finding. Thereupon the court overruled the exception to the admission of the copies.

We concur with his Honor that reasonable search had been made for the missing papers, and that the order of *Judge Peebles* had, at least, been substantially complied with. It was fairly exhaustive as to sources of information and probable places of deposit, and to have required more would have rendered it practically impossible to have complied with the order. There is really no tangible or reliable proof that there is any variance between the originals and the copies—none upon which a finding to that effect should legally be made. It is merely suggestion, conjecture, or supposition; but even if there had been some proof to that effect, the defendants satisfied the court that they had made a diligent effort to comply with the order, as they were required by its terms to do. *Justice Ruffin* said, in *Love v. Harbin,* 87 N. C., at p. 254: "A main purpose intended to be accomplished by registration is the perpetuation of the instrument, and of the memorial of its probate and order of registration, and it will not do to hold that this intention of the statute may in every case be defeated by a notice to produce the original. Under the operation of such a rule it would be next to impossible to establish any title depending upon very ancient deeds, as they are rarely preserved so

as to pass with the land; and this partly because it is universally understood that when once registered the proofs of their execution and probate are perpetuated."

Sixth. As to the testimony of Mr. Davidson in regard to proceedings in *Wyman v. Taylor,* we do not see how it could be competent, if relevant to the issue in this case, to show that the court refused certain instructions in that case. It was *res inter alios acta.* The court submitted the evidence for the purpose of showing the *litem motam,* as the record states.

Seventh. The description in a junior grant may not be evidence of the location of lines or boundaries of a senior grant (*Sasser v. Herring, supra; Hill v. Dalton,* 136 N. C., 339); but it was the survey of Siler that fixed the Bryson line, and this was made prior to the date of the senior grant, No. 3290. This is quite a different question from the one decided in the cases cited. The court properly admitted the map and certificate of survey to corroborate Siler.

Eighth. If there is any defect in the defendant's chain of title, it does not concern the plaintiffs in this appeal, as they must recover upon the strength of their own title, and not upon the weakness of their adversary's. They cannot recover by showing merely that defendants had no title, even if this be true.

Ninth. The referee was not bound to find a fact simply because there may have been some evidence of it, as he had the right to weigh the same, and therefore he could consider the evidence of reputation as to the Bryson line in connection with the other evidence in the case, and was not compelled to find in accordance with the reputation. He considers the whole evidence, and not merely a part of it; and this applies to other exceptions based upon his failure to find certain facts.

Tenth. The testimony of Joseph M. Greer, as to certain facts told him about the Bryson northeast corner at Defeat Ridge, was properly excluded, as he said "it seemed to be agreed by all of said persons"; but just who it was that called his attention to it he would not say positively, because he did not recollect every person present. This was entirely too indefinite. He did not, and could not, say who it was, nor did he state what was said, so that the court could judge of the quality of the testimony, but he was only able to state that "it seemed to be agreed by them." The witness must be able to give the substance of what was said and by whom, and the impression made on him will not answer the purpose. This was held in *Grant v. Mitchell,* 156 N. C., 15, where, at p. 18, it is said: "The secondary witness may give the substance, but not the mere *effect,* of the former testimony. To allow him to state the latter only would be to permit him to decide upon the effect of the testimony, instead of submitting it to the jury, to whom it properly belongs,"

quoting from *Jones v. Ward,* 48 N. C., 26, and citing *King v. Joliffe,* 4 Term R., 290.

There are a few more exceptions, but they are fully covered, we think, by what we have said in regard to the others, and require no further discussion. It may be said generally, and in conclusion, that no reference is made in Grant No. 3290 to Deep Gap or Forester Ridge as a line of the grant, and this is made more significant by the fact it is referred to only for the purpose of describing the beginning corner at the chestnut oak (A on map), and the next call is "north with Col. T. D. Bryson's line," and so forth, and not "north with the Deep Gap or Forester Ridge, Col. Bryson's line," as we would expect if the ridge controlled the call. The referee and judge find that it was not the intention to make the ridge one of the lines, or Defeat Ridge one of the corners, but the sole intention was to start at the chestnut oak and go to the sugar tree or maple at the head of Big Chestnut Ridge. It is found as a fact that in the survey of 1871, for Grant No. 3290, the line was measured along Deep Gap or Forester Ridge and carried to Thunderhead, it being the head of Defeat Ridge, in order to *retrace the survey of 1867, for the purpose heretofore stated,* which was triangulation, the object being to locate the line from A to D, or from the first corner to the sugar maple, and to establish, at the latter place, the Bryson northeast corner. If a line had been run along Deep Gap, it could not be adopted as a line of the survey unless it was so intended to be, and it is found by both referee and judge that there was no such intention. The line from A to D was marked for some distance at either end, and cuts or hacks made on the chestnut tree at the place of beginning, and, at the time, indicating its direction. Besides, to fix the line at A-D will harmonize with the other calls of the Bryson tract of land. All these things being considered—and others could be added—make it safer and more certain, as a guide to the intention of the parties, that the call should be controlled by the Bryson line as thus located, from A to D, than by the line A-B, which is not even north, and has no such indicia of a line as we find on the other. Again we say, physical monuments will have the preference in the calls, unless there is some more definite and certain call that clearly indicates the intention of the parties. There is no hard and fast rule of the law that is permitted to have the effect of defeating the clearly expressed will of the parties.

It must be borne in mind that we are dealing with a referee's report, in which the facts were found and the findings afterwards confirmed by the judge, and this renders many of the cases cited by the plaintiff inapplicable. It is found, for instance, that the line from A to B was not run and marked, nor was it intended to be the first line of the Kelly survey, but the line A-D was intended to be the first line, and, further, that the line A-B, by Forester's Deep Gap Ridge, was run, though not

marked, for the purpose solely of locating the line A-D as the first line of the tract, the Kelly survey having been made just as was the Siler survey and for the same purpose. The rule, therefore, which classifies locative calls into natural objects, mountains, rivers, lakes, and creeks, artificial objects, as marked trees, lines, and course and distance, giving them rank in the order named, does not require, in this case, that the first line should run from A to B, without any regard to the call for Bryson's line, as the line A-D was actually run and marked for the first line; and, besides, there are other calls in the survey of equal importance with the one for Defeat Ridge, which would have to be disregarded if that is adopted as the end of the first line. If the line is run from A to D, we are following the footsteps of the surveyor, and rejecting a false description for that which is not only certain, but which the referee and judge say was the one actually adopted by the parties at the time of making the surveys. This is not a case where there is a call by course merely to a certain object, for here the course is controlled by an additional call for a well established line of another tract, which was actually run and marked when the Bryson line was surveyed, and the question is whether the course should be along said line. The well settled rule, and the true construction of the grant, require this departure from the course. *Lumber Co. v. Hutton,* 159 N. C., 445; *Whitaker v. Cover,* 140 N. C., 280; *Bowen v. Lumber Co.,* 153 N. C., 366. Abstract rules of law should not be so applied as to disappoint the clear intention of the parties, *Triplett v. Witherspoon,* 149 N. C., 394; *Gudger v. White,* 141 N. C., 507, and the rules of law in respect to boundary were adopted to prevent such a result. It may be added that Forester or Deep Gap Ridge, along which the Kelly survey is claimed to have been made, appears to be quite as prominent and as well known as Defeat Ridge, and yet there is no mention of it in the surveys, or the grants, as a line. It is argued by plaintiffs that it would be far more certain, if called for, than the line of another tract; and if this is so, why did not the surveyor call for it?

The record and the briefs are voluminous, the record containing 805 and the briefs 342 printed pages, and there were a large number of exceptions, running into the hundreds. Some of the questions are highly important and very delicate in certain of their phases. The case has been strenuously contested, with great ability and research, and the Court has bestowed upon it most careful study and reflection. We have concluded that we but decide it upon its true legal merits when we hold that no error was committed at the hearing in this the plaintiff's appeal.

No error.

DEFENDANT'S APPEAL.

PER CURIAM. In the defendant's appeal it is found, and so adjudged by the Court, that there is no error in the proceedings or judgment.

No error.

PLAINTIFF'S APPEAL.

BROWN, J., dissenting: I feel compelled to differ from the conclusions reached by the majority of the Court in this case, and I will state my reasons as briefly as possible.

This is an action brought to recover a triangular tract of land delineated on the map as beginning at A, running to B, thence to D, and back to A. The plaintiff's appeal involves the proper location of the first line of Grant No. 3290. The beginning corner of this grant is admitted by all parties to this action to be correctly located, and is shown on the court map at the letter A. The description of Grant 3290 may be analyzed as follows:

1. A tract of land containing 10,000 acres.
2. Lying in Macon County, Section No. ———, District No. ———.
3. Being part of the lands lately acquired, etc.
4. Bounded as follows, viz.:
5. On the waters of Hazelnut Creek.
6. Beginning at a chestnut oak on a trail leading from the mouth of Sugar Fork Creek to the Deep Gap.
7. Beginning and running with Col. T. D. Bryson's line.
8. Eighteen hundred poles north *to the Tennessee line at the head of Defeat Ridge.*
9. Cornering with Bryson's northeast corner.
10. Thence east 700 poles to a beech, where the Locust Ridge reaches the Tennessee line, etc.

It is admitted that the chestnut oak at A is the beginning corner of this grant. I am of opinion (1) that the first line of Grant 3290 begins at A and runs to B on the map as *a conclusion of law* wholly irrespective of whether there ever has been or is now a "Bryson's line," and regardless of where it was located or alleged to have been located. In other words, the existence and location of this line is entirely immaterial for the purpose of establishing the first line of Grant 3290. The admitted facts show that this grant was located by starting at A and running to B, this being the identical line actually run and marked at the time the entries were made.

(2) Assuming that the Bryson line is material, it appears to be undisputed that at the time of the survey in 1871 and the issuance of Grant 3290 thereon in 1872, the line from A to B was reputed to be the Bryson line, even though that repute was incorrect, and the surveyor located the first line of Grant 3290 under the belief that he was running with the true Bryson line, and he acted upon that belief, although it may have been erroneous.

The referee finds "that Defeat Ridge is located as plaintiff claims, being the ridge going up between the prongs of Little River, in Tennes-

see, and the head of Defeat Ridge culminates at and with other converging ridges and forms the easternmost knob of the group of knobs known as Thunderhead, on the State line between North Carolina and Tennessee, the said *head of Defeat Ridge being at the point marked B on the official map.*"

The Court finds that in making the survey in 1871 of the B. L. Sawyer entries, upon which Grant No. 3290 issued, in 1872 M. L. Kelly, the county surveyor, with his crew, surveyed from the said point "A" up the Deep Gap or Forester Ridge to the top of the Smoky Mountain at "B" at the head of Defeat Ridge, and at the said point "B" made and marked a corner on a tree of the survey he was then making and upon which Grant No. 3290 issued. The said tree was marked as a corner by M. L. Kelly in 1871, having been previously marked as a corner of the Bryson survey in 1867.

The call for 1800 poles north to the Tennessee State line at the head of Defeat Ridge is, in my opinion, controlling. There are two well defined objects that are unmistakable; one is the State line that divides North Carolina and Tennessee, and the other is Defeat Ridge. This ridge, as shown by the evidence, and not controverted, is one of the most prominent natural objects in the whole of that great range of the Smoky Mountains, and because of its prominence has been long and well known to the citizens and inhabitants of both States of Tennessee and North Carolina, as well as to the United States surveys and to geographers. It would be difficult to find a better defined and located natural object, or one better known in all that country. The location of this right where it joins the Smoky Mountains and its relation to the State line was overwhelmingly established by the evidence, and the court found the fact to be that it was located at "B.'

It was also admitted that the dividing line between the States of Tennessee and North Carolina passed along the crest of the Smoky Mountains. So that we have here a remarkable conjunction, in fact, of both the descriptions mentioned in the surveyor's certificate of his survey, and the grant issued thereon, viz., "the Tennessee line and Defeat Ridge."

These facts being practically admitted or indisputably ascertained, under the repeated and well settled decisions of this Court, it follows, as the legal result, that the first line of Grant 3290 begins at "A" and runs to "B." As I read the cases, this rule of law may be regarded as an ancient one in this State, and so well settled that it can hardly be seriously questioned.

Among the many cases cited in the elaborate and learned brief of the plaintiff's counsel, we find the following to be especially in point, where the rule is most instructively applied to facts very similar to those in

the case under consideration: *Miller v. Cherry,* 56 N. C., 29; *Jones v. Robinson,* 78 N. C., 398; *Flannigan v. Lee,* 19 N. C., 430; *Carson v. Burnett,* 18 N. C., 558; *Jones v. Bunker,* 83 N. C., 327; *Reid v. Schenck,* 14 N. C., 65; *Graybeal v. Powers,* 76 N. C., 71; *Waters v. Simmons,* 52 N. C., 543.

When a deed sufficiently identifies a thing by its known name, or other means, and then superadds, unnecessarily, to the description, such further description, though inaccurate, will not vitiate the previous and perfect description. *Simpson v. King,* 36 N. C., 11; *Mortgage Co. v. Long,* 113 N. C., 126; *Proctor v. Pool,* 15 N. C., 373.

The head of Defeat Ridge is a natural object so commanding in its character that it answers the description fully, and is sufficient of itself to locate the second corner, regardless of whether the line runs with Bryson's line or not. The unnecessary and false description will be disregarded and the line run to this controlling natural monument.

In *Ehringhaus v. Cartright,* 30 N. C., 42, it is said: "Many of the rules respecting boundaries are examples of preferring one part of a description, turning out to be true, to another part, turning out to be untrue. The case of *Proctor v. Pool,* 4 Dev., 370, is an instance of the application of the rule to a general description of the thing devised, the Court holding that the effect of the true description was not to be weakened by a further and unnecessary false description." *Smith v. Low,* 24 N. C., 460.

In *Miller v. Cherry,* 56 N. C., 29, it is said: "Our decision is made under the rule that *where more than one description is given, and there is a discrepancy, that description will be adhered to as to which there is the least likelihood that a mistake would be committed,* and that be rejected in regard to which mistakes are more apt to be made. This is a rule of frequent application. If a tract of land be described by natural objects, or corner trees, and also by course and distance, and there turns out to be a discrepancy, the latter description is rejected."

In *Addington v. Jones,* 52 N. C., 584, the Court said: "This rule, in respect to questions of boundary, presupposes that the description *which is to control, and be put in the place of course and distance, has of itself* sufficient certainty to locate the land, supposing the course and distance which it controls and contradicts to be stricken out of the grant."

In *Stafford v. King,* 94 Am. Dec., 308, it is laid down that the general rules in respect to locating land are: (1) By natural objects, such as rivers, mountains, lakes, creeks; (2) artificial marks, such as marked trees and lines; (3) course and distance.

In this case *Chief Justice Marshall* is quoted as having said that "The most material and most certain call shall control those which are less material and less certain." In this case it is laid down as a prime rule

that the "Footsteps of the surveyor must be followed, and the above rules are found to afford the best and most unerring guides to enable one to do so."

In *Doe v. Payne,* 11 N. C., 71, it is said that "When the natural boundary is *unique* it has properties peculiar to itself." A more distinctive, commanding, and controlling object could scarcely be thought of than the well known head of a great mountain ridge.

In *Carson v. Burnett,* 18 N. C., 558, it is said: "The object in all boundary questions is to find some certain evidence of what particular land was surveyed, or was intended to be conveyed. . . . When the call is for the line of another tract, it has also been held that course and distance may yield to it. But it is, obviously, *not so decisive as the call for a natural boundary.*"

In *Waters v. Simmons,* 52 N. C., 543, the Court stated: "One of the calls of the grant . . . is, 'The head of Spellar's Creek,' which is certainly a natural object," etc. "It was the duty of the court, then, to instruct the jury that, as a construction of law, the head of 'Spellar's Creek' was one of the corners of the defendant's tract of land," etc. This is precisely in point in the case at bar. The call is to the State line at the head of Defeat Ridge. Defeat Ridge is a "natural object." Its head is at the Tennessee line and it was the duty of the judge to declare that it was one of the corners of the grant (No. 3290) to W. L. Love.

The defendants insist that the way to go to "B" from the admitted beginning at "A" is to run from "A" to "D," the head of Big Chestnut Ridge, and the defendants' alleged northeast corner; thence westerly along the top of the mountain to "B," a distance of 3 or 4 miles, and then run back in an easterly direction over precisely the same line and same distance to "D" and then resume the survey of the lines of Grant 3290 along the mountain until they turn southwardly to the beginning.

The referee so concluded, and his judgment was affirmed by the court below. In view of the well settled principles of law set forth in the cases that we have cited, I see neither reason in nor authority for such ruling.

The defendant, admitting that the Bryson line was actually run as claimed by the plaintiff, undertakes to explain it by saying that the straight line from "A" to "D," intended as a Bryson line, was not actually run and marked from "A" to "D" because the line would run through a country badly infested with rattlesnakes, and, therefore, they ran from "A" to "B" and by triangulation platted the true Bryson line from "A" to "D."

This explanation may or may not be true, but it cannot have the effect of changing the controlling call for Defeat Ridge. It is but added proof that the Bryson line was actually run where the plaintiff claims it was, and that is consistent with the call from the chestnut oak to Defeat Ridge.

There are several exceptions to the evidence, which are set out in the assignments of error and commented on in the plaintiff's brief, some of which, in my opinion, are well taken and entitle the plaintiff to a new trial, but in the view I take of the case it is not necessary to prolong this opinion by commenting upon them.

I am of opinion that upon the admitted facts the plaintiff is entitled to judgment for the tract of land bounded and described in Grant 3290, beginning at chestnut oak "A" and running to "B" at Defeat Ridge.

The CHIEF JUSTICE concurs in this opinion.

J. H. WORLEY BY HIS NEXT FRIEND v. SOUTHERN RAILWAY COMPANY.

(Filed 24 May, 1915.)

Railroads—"Safety Appliance Act"—Power Brakes—Local Switching—Interpretation of Statutes.

The requirements of the Federal "Safety Appliance Act," that railroads in the operation of interstate trains must be equipped with a certain kind of brake, do not apply to the local switching of cars on the company's switch yard, and the failure of the company to provide them in such instances affords no evidence of actionable negligence in an action to recover damages. Instances where interstate trains are being carried by switching crews from one location to another a few miles distant, its final destination, distinguished.

APPEAL by plaintiff from *Cline, J.*, at October Term, 1914, of BUNCOMBE.

Civil action, tried upon the ordinary issues of negligence, contributory negligence, assumption of risk, and damage. His Honor directed the jury upon all the evidence to answer the first issue as to negligence "No," and rendered judgment dismissing the action. The plaintiff excepted and appealed.

Zeb F. Curtis, A. H. Johnston, V. S. Lusk for plaintiff.
Martin, Rollins & Wright for defendant.

BROWN, J. This action is brought by the plaintiff to recover damages for personal injury, received in operating a hand brake upon a car of the defendant while engaged in switching operations in the defendant's switching yards at Asheville.

The evidence tends to prove that it was the plaintiff's duty to get on top of the cars and apply the hand brakes as the cars descended from an elevated point in the railroad switching yards called the "Big Hump"; that plaintiff got aboard the third car from the rear for the purpose of

applying the hand brakes, and while using the usual brake-stick for that purpose, and applying the brakes in the usual way, the brake-stick slipped out of the brake wheel, causing the plaintiff to fall to the ground, in consequence of which he was injured.

The only ground of negligence alleged is the failure of the defendant to have coupled up and in use on these cars, while engaged in switching movements on the switching yards in Asheville, power brakes, or brakes under the control of the engineer on 85 per cent of the cars in use.

It is admitted that the defendant is engaged in interstate commerce and that at the time of the injury the plaintiff was employed in interstate commerce, and that this action is brought under the "Employers' Liability Act." The only question presented is whether or not the Federal statute known as the "Safety Appliance Act" applies to switching operations upon the switching yards of a railroad corporation.

The act provides: "It shall be unlawful for any common carrier engaged in interstate commerce by railroads to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliance for operating the train brake system or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose." Thornton (2 Ed.), page 452.

We agree with the judge below, that the provisions of this act do not extend to switching operations in the switching yards and terminals of railroad companies. This is the view taken by the Federal courts, and it seems to have been regarded by the Government that to extend the use of automatic brakes for switching operations is impracticable.

In the case of the *Erie Railroad Co. v. U. S.*, 197 Fed., 287, this question was considered by the Circuit Court of Appeals, Third Circuit. In the opinion it is said: "It is conceded by the Government that this act does not apply to, or at least has never been enforced as to switching operations. Manifestly, such is the reasonable construction of the act." Again: "That it was meant to apply to train transit as contrasted with switching operations is clear, not only from the essentially different character of the operations, but from the wording of the act itself." In the opinion is quoted cases from the other Federal courts.

It seems that this particular question has not yet come before the Supreme Court of the United States. This construction of the statute has been adopted by the Supreme Court of New Jersey in the case of *Farrell v. Penna. Ry.*, 93 Atl., 682. In the opinion the case of the *Erie Railroad Co. v. U. S.* is cited and approved, the Court saying: "It must suffice to say that the construction given by the Federal courts to the act

in question must, upon familiar principles applicable to Federal legislation, be controlling upon this Court in its construction and application of the act."

There is only one case in the Federal courts that has been cited as contrary to this view, and that is the case of *Atchison Ry. Co. v. U. S.,* 198 Fed. Rep., 637. Upon an examination it will be found that the case is easily distinguished from the *Erie case* and is not an authority adverse to that decision. In the *Atchison case* it appeared that the trains on that system, engaged in interstate traffic, were stopped before reaching Chicago, at Corwith, an outer Chicago yard. The train in question was destined to the Atchison inner yard at Eighteenth Street, about 8 miles distant. At Corwith the regular train crew was relieved by the switching crew, who ran the train on to its destination. In that case it was held that the section of the act was not limited to road trains, but applied to interstate trains destined to a particular railroad yard, although before terminating the trip and reaching the destination they were operated a part of the way by a switching crew. An examination of that case discloses that it does not at all conflict with the other cases decided by the Federal courts construing the "Safety Appliance Act."

Since the above was written we have received copies of the opinions of the Supreme Court of the United States (just handed down) in the cases of *U. S v. Erie R. R. Co.* and *U S. v. C. B. and Q. Ry. Co.,* dealing with the very question at issue in this case.

In the former case the decision of the Circuit Court of Appeals of Third Circuit is reviewed and reversed, upon the ground that upon the undisputed facts the operations were not switching operations, but those of trains in transit from Jersey City to Weehawken, Bergen, and other points around New York Harbor. Nevertheless, in construing the statute the Court says: "It will be perceived that the air-brake provision deals with running a train, while the other requirements relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey, it is within the operation of the air-brake provision. But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains which have completed their run are broken up. These are not train movements, but mere switching operations, and are not within the air-brake provision. The other provisions calling for automatic couplers and grab-irons are of broader application, and embrace switching operations as well as train movements, for both involve a hauling or using of cars."

In the case at bar there is no question as to the character of the operations. The plaintiff was not injured while assisting in conducting a train from one place to another on the line, but he was injured in switching operations, pure and simple, upon the local Asheville switching yards.

No error.

JAMES T. HORTON v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 12 May, 1915.)

1. Master and Servant—Railroads—Safe Place to Work—Unusual Dangers—Defects—Promise to Repair—Continuing to Work—Assumption of Risks—Evidence—Instructions.

The plaintiff was injured while engaged in the performance of his duties as defendant railroad company's locomotive engineer, caused by the explosion of a water-glass placed in his cab, as a part of the appliances of the locomotive to show the quantity of water in the boiler. There was evidence tending to show that a guard glass to the water gauge was missing, which was used for the purpose of protecting engineers from injury of the character inflicted in this case; that plaintiff notified the proper official of the defendant that it was gone, asked for another, and was informed that there were none in stock, but one would be gotten from Portsmouth. This having been decided in the United States Supreme Court on *certiorari*, 233 U. S., 492, a new trial awarded defendant, from which the present appeal comes, it is *Held*, that the case was properly tried on the principles therein declared, and no error was committed by the trial judge in his instruction to the jury, in substance, that the employee does not assume risks of a dangerous occupation not naturally incident thereto until he becomes aware of the defect or disrepair, or unless a man of ordinary prudence under the circumstances would have observed and appreciated the unusual danger; that if he continues work under the master's promise to repair for a time reasonably necessary to make it, he does not assume the risk of his employment unless the danger be so imminent that no ordinarily prudent man would continue therein under the promise to repair.

2. Court's Discretion—New Trials—Newly Discovered Evidence—Appeal and Error.

The refusal of the trial judge to grant a new trial for newly discovered evidence is a matter within his discretion and not ordinarily reviewable on appeal.

WALKER, J., concurring; BROWN, J., dissenting.

APPEAL by defendant from *Whedbee, J.*, at September Term, 1914, of WAKE.

Douglass & Douglass, R. N. Simms, and W. B. Snow for plaintiff.
Murray Allen for defendant.

CLARK, C. J. This is an action for personal injuries suffered by the plaintiff, while an engineer in defendant's employment, by the explosion of a water-glass on the defendant's locomotive, impairing the sight of

the plaintiff's right eye. The case was first here 157 N. C., 146, when a new trial was awarded. It was here again 162 N. C., 424, and upon writ of error it was then heard in the United States Supreme Court, 233 U. S., 492, and the writ being sustained, the case was remanded to the lower court, where, as we think, upon a review of the record, it has been tried strictly in conformity with that opinion of the United States Supreme Court.

The argument of the defendant seeks to put the plaintiff in this predicament: that if the likelihood of injury from an explosion of the glass was not apparent, then the defendant was not guilty of negligence; but, on the other hand, if such defect was apparent, then the plaintiff assumed the risk and is equally barred from recovering damages.

But that was not the ruling of the United States Supreme Court, as we understand it. That Court held: "When the employee knows of a defect in the appliances used by him, and appreciates the resulting danger, and continues in the employment without objection or without obtaining from the employer an assurance of reparation, he assumes the risk, even though it may arise from the employer's breach of duty. But where there is promise of reparation by the employer, the continuing on duty by the employee does not amount to assumption of risk, unless the danger be so imminent that no ordinarily prudent man would rely on such promise."

The plaintiff testified that he notified the proper official that the guard-glass was gone, and asked for one, and the reply was that the road did not have any in stock, but had them in Portsmouth, and the company would send there and get one, and said that the plaintiff would "have to run the engine like she was."

There was evidence from which the jury could find that while the absence of the guard-glass was a defect causing danger to the plaintiff, and which amounted to negligence on the part of the defendant, yet it was not such an imminent danger as would justify excusing the defendant, if the plaintiff remained on service after reporting the defect and receiving assurance that it would be repaired. The court properly told the jury that "Risks not naturally incident to the occupation may arise out of the failure of the employer, the defendant in this case, to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These latter risks the employee is not treated as assuming until he becomes aware of the defect or disrepair or of the risk arising from it, unless the defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them."

The court further charged: "When an employee does know of the defect and appreciates the risk that is attributable to it, then if he con-

tinues in the employment without objection, or without obtaining from his employer or representative the assurance that the defect will be remedied, the employee assumes the risk, even though it arises out of the master's breach of duty. If, however, there be a promise of reparation, even during such time as may be reasonably required for its performance or until the particular time specified in such performance, the employee relying upon the promise does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man would rely upon such promise."

The defendant excepted to the above instructions, but we think it is strictly in accordance with the decision of the United States Supreme Court in this case, and that upon the evidence the jury were authorized to find, as they did in response to the second issue, that the plaintiff did not assume the risk of injury.

There are numerous other exceptions, but this case has been so fully considered in every aspect of the law and the facts have been so fully set forth on the two former appeals in this Court, and also upon consideration of the writ of error in the United States Supreme Court, that it would be work of supererogation to go over the same ground a fourth time.

The very careful and learned judge who tried this case below seems to have fully comprehended and to have closely and carefully followed the decision of the United States Supreme Court upon the points on which that Court gave a new trial, and we find no error in his rulings.

The only other exception that we need refer to is the refusal by the court below of the motion for a new trial for newly discovered evidence. Such refusal was discretionary with the court, and is not reviewable here. It is true, the judge stated that the newly discovered evidence, if true, was merely cumulative. But that does not justify us in reversing his judgment denying the motion for a new trial.

The defendant's cause has been very fully and ably presented, but we find nothing that would justify us in setting aside the verdict and judgment. The court and jury had the benefit of all the light that could be shed upon this controversy, from every angle, by this Court and the United States Supreme Court, and seem to have faithfully followed the views of the Court of highest resort where it differed from the views of this Court, and in other respects to have followed the well settled decisions of this tribunal.

No error.

BROWN, J., dissenting: I am unable to agree with the conclusion reached by the Court in this case. The decision of the United States Supreme Court leaves it open to us to say whether the plaintiff, as a

matter of law, assumed the risk of injury from the defective water-glass. That question was not passed upon, and if it had been, upon the facts as then presented that would not prevent a consideration of the question upon this appeal, when the facts showing assumption of risk are much stronger.

The United States Supreme Court reversed our judgment and remanded the cause for further proceedings not inconsistent with their opinion.

Mr. Justice Pitney states the law of this case as follows: "When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employee, relying upon the promise, does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise." *Seaboard Air Line Railway v. Horton,* 233 U. S., 492.

Applying this rule to the undisputed evidence, I am of opinion that the plaintiff assumed the risk of injury and is not entitled to recover.

Plaintiff was operating an engine equipped with a Buckner water-glass, which is so constructed that a thick guard-glass is placed over the front of the water-glass to protect the engineer from injury in the event the inner glass should explode. The engine was also equipped with another method of determining the amount of water in the boiler, that is, by means of gauge cocks placed on the head of the boiler. Plaintiff made the first trip from Raleigh to Aberdeen on 27 July, returning in the evening of 28 July, and he was returning from the third trip to Aberdeen when he sustained the injury to his eye by the explosion of the water-glass, on 4 August. It required two days to make the round trip.

On the morning plaintiff was called to take this engine for the first trip to Aberdeen, he noticed before leaving Raleigh that there was no shield or guard on the water-glass. Without making complaint of the condition of the glass, plaintiff made the trip to Aberdeen and return. Upon his arrival in Raleigh at the end of his round trip, he made a written report of the condition of his engine upon forms provided for that purpose, and in accordance with the defendant's requirements he placed the report on file in the roundhouse or put it in a box there for that purpose. This, according to the plaintiff's evidence, was the way provided by the company for procuring repairs. Plaintiff, and a num-

ber of defendant's witnesses, said that these work reports were required to be in writing, that they were filed and distributed among the workmen for the purpose of making the required repairs. It appears in evidence that plaintiff made a written report on this engine at the return of each round trip, and noted every defect in his engine except the absence of the guard-glass.

On 4 August, while engaged in shifting cars at Apex, N. C., the water-glass exploded and injured his eye. Immediately after the explosion plaintiff cut off the gauge-glass at top and bottom, and the engine was operated to Raleigh with the gauge cocks as the means of determining the amount of water in the boiler.

The guard-glass referred to as part of the Buckner equipment is a thick piece of glass, 1 or 2 inches wide and 8 or 9 inches long, with a thickness of about one-half of an inch. Plaintiff testified that the piece of glass in front of the tube is to prevent the flying glass from hitting the engineer in case the inner tube should burst; that the insertion of this glass will prevent flying glass from striking the engineer or other persons in the cab if the tube explodes. In answer to questions on cross-examination, plaintiff testified: "Yes, it is dangerous to run it (the engine) without a guard-glass. You see, the tube might explode. The guard-glass is put there to prevent the explosion of the inner tube injuring the engineer. The purpose of the guard-glass is to make it safe for the engineer to operate his engine with the Buckner water gauge." Plaintiff further testified that at the time of the accident the steam pressure in the unprotected glass tube in the Buckner gauge was 200 pounds, and that it was liable to explode at any time. He said: "I knew that with that guard-glass out that the tube was liable to explode with the 200 pounds pressure on it. I knew that it was liable to explode, but I could not tell when." At the time of his injury plaintiff was sitting on the left-hand side of the cab, facing the glass, which was within a few feet of his face. He said: "I was going to cross over on the fireman's side to see the conductor, whether he was ready to couple up, and that put me directly facing the glass, with my eye directly opposite that slit," and while in this position the explosion occurred. Plaintiff gave an estimate of the dimensions of the inner tube, as follows: "12 or 14 inches long and about three-eighths of an inch thick, and one-half inch in diameter."

Plaintiff described the method of gauging the water in the boiler by the three gauge cocks, and said that Benton, his fireman, brought the engine in from Apex to Raleigh, using the gauge cocks to tell how much water he had in the boiler. This was immediately after the accident. He said that he did not cut out the water gauge and use the gauge cocks on any of the three trips he made with this engine; that he did not

attempt to run the engine without the water-gauge glass. On a former occasion a water-glass exploded and injured plaintiff's eye, while he was employed on one of defendant's engines.

Ernest Horton, plaintiff's witness, testified: "The water-glass and gauge cocks are right upon the head of the boiler, right at hand, and he has to use them in running his engine—not constantly, though. They are there all the time for his use. By turning those three gauge cocks you can gauge somewhere near about the water in the boiler, but you cannot tell the perfect level. The guard-glass on the Buckner water gauge is to prevent the glass from spattering in your face when the inner tube bursts that comes out with the water and steam. This glass is put in there to prevent the glass from sputtering out in case that glass bursts."

Dave Campbell, an engineer of ten years experience, testified that an engineer can operate an engine in safety by the use of the gauge cocks; that if his water-glass guard is missing, it would be his duty to cut out the glass and use the gauge cocks. He said: "It is very dangerous to use the Buckner water gauge without the guard-glass, because it has a tendency to throw the glass in a certain direction if it explodes. That glass tube on the Buckner water gauge is liable to explode. I have shut off the water gauge and run on the gauge cocks many a time." Lewis Archer testified for the defendant that he has been in the railroad business since 1882; that he is familiar with the construction and operation of the Buckner water-glass. "It is a safe water-glass with the guard-glass in place. With the guard-glass out of place, it is one of the most dangerous things you could have on an engine, on account of that slot; when the glass breaks, it throws the glass out of that one place. You can operate an engine without a water gauge with safety, by using the gauge cocks. I consider that the safest plan of operation."

In my opinion, the only conclusion to be drawn from this evidence is that no man of ordinary prudence would have continued to work in the face of so great and so imminent a danger. The defendant moved for judgment of nonsuit at the conclusion of the evidence and requested the court to instruct the jury that if they believed the evidence they would answer the issue of assumption of risk "Yes." This has the effect of a request to withdraw the case from the jury.

It is said to be well settled by the Supreme Court of the United States that it is the duty of the trial court to withdraw a case from the jury where the evidence is undisputed or is so conclusive that the court, in the exercise of its discretion, must set aside a verdict returned in opposition to it. *Randall v. R. R.,* 109 U. S., 478; *R. R. v. Converse,* 139 U. S., 469. This rule has been applied by the Court in an action involving the

defense of assumption of risk, where it appeared from plaintiff's evidence that he assumed the risk. *Butler v. Frazee,* 211 U. S., 459.

In the case of *District of Columbia v. McElligott,* 117 U. S., 622, the United States Supreme Court has applied the doctrine which, in my judgment, sustained the defendant's right to an instruction that plaintiff assumed the risk of injury. In that case the plaintiff, who was in the employ of the District, was injured while at work on a bank of gravel. The evidence tended to show that he discovered that there was danger of the bank caving in, and went to the supervisor for more men to do the work, and for one man to watch the bank, and that he received the information that such assistance would be sent. Before the assistance arrived the bank caved in, causing his injury. The Court said: "Assuming that the District might be responsible under some circumstances for injuries resulting from the negligence of its supervisor, it certainly would not be liable if the danger which the plaintiff apprehended from the beginning was so manifest as to prevent a reasonably prudent man from risking it upon a promise or assurance by the proper authority that the cause from which the peril arose would be removed. . . . If he failed to exercise such care, if he exposed himself to dangers that were so threatening or obvious as likely to cause injury at any moment, he would, notwithstanding any promises or assurances of the District supervisor of the character alleged, be guilty of such contributory negligence as would defeat his claim for injuries so received." *Roccia v. Coal Co.,* 121 Fed., 451; *Attleton v. Mfg. Co.,* 5 Ga. App., 779; *R. R. v. Watson,* 114 Ind. In *Alteriac v. Coal Co.,* 161 Ala., 435, it is held: "Where a miner of many years experience saw a pot- or bell-shaped rock in the roof of a mine, and knew that it was more or less disconnected and liable to fall without warning at any moment, and after telling his superior of it, and that he would not work without timbers, but who returned to the work under the pot- or bell-shaped rock on being told to do so, and on the promise that the timber would be sent at once, assumed the risk incident to his return and work thereunder." In *Erdman v. Steel Co.,* 59 Wis., 6, the Wisconsin Supreme Court holds: "An experienced servant cannot recover if he continues, even for an hour or two, to encounter the obvious and immediate danger of using a cracked saw to cut steel plates." In the case of *McAndrews v. R. R.,* 39 Pac., 85, in which the plaintiff continued to use a defective hand-car which was likely to jump the track at any moment, the Supreme Court of Montana says: "If the machinery is not only defective, but so obviously dangerous that no ordinarily prudent man would assume the risk of using it, and the employee does use it, knowing its absolutely and obviously dangerous condition, and the dangers of using it, the master is not liable, notwithstanding the promise to remedy the defect."

These cases illustrate the rule that after promise to repair the workman assumes the risk if the danger is such that a prudent man would not continue to work in the face of it. That the danger in this case is of that character appears to me to require no argument.

I am of opinion, also, that defendant's request for instruction that plaintiff was guilty of contributory negligence should have been given. This is a question of law when the facts are undisputed. *Strickland v. R. R.,* 150 N. C., 4; *Aerkfetz v. Humphries,* 145 U. S., 418. Plaintiff used the defective water-glass when he had at hand a safe way to operate his engine, that is, with the gauge cocks. This was contributory negligence. *Covington v. Furniture Co.,* 138 N. C., 74; *Whitson v. Wrenn,* 134 N. C., 86.

There are other exceptions in the record which are discussed in defendant's brief, raising important questions, but which I will not discuss. What I have written presents my views upon the main questions.

WALKER, J., concurring: The facts as now presented are not materially different from those before us on the former appeal. There was then a motion to nonsuit, which was passed by the Supreme Court of the United States without comment. It was hardly necessary to order a new trial for error in the charge if, upon the whole case, the plaintiff was not entitled to recover by reason of the assumption of risk. It is, therefore, to be fairly if not necessarily inferred, from the refusal to nonsuit, that there was, at least, some phase of the evidence that carried the case to the jury. The motion to nonsuit was entitled to first consideration, as if decided favorably to the defendant (plaintiff in error) it fully and finally disposed of the case, and the other questions raised by the assignments of error would, therefore, have become immaterial. But if this were not so, the motion should not now be allowed. It is true that the water gauge was "liable to explode," but an explosion was not so imminent as to require that Horton should quit the service of defendant, when he had been promised that the glass gauge would be repaired. A prudent man would probably take such a risk, and it was for the jury to say whether he would. He did not continue his work for any unreasonable length of time, but only for a very short time, and the question of assumption of risk or contributory negligence was eminently a proper one for the jury. Nor can it be said that plaintiff's failure to use the three gauge cocks on the head of the boiler was negligence, as matter of law. He testified that they could be used and sometimes were used for the purpose of gauging the quantity of water in the boiler or to ascertain its level, but that they are not altogether reliable or accurate, for he said that they would gauge somewhere near the quantity of water, but will not give the perfect level. He stated that an engine can be run without a water-glass and with gauge cocks, if the latter will stay open, but that they are liable to be-

come clogged and are easily stopped up by mud or sediment from the water. To give his language: "Yes, you can operate an engine without a water gauge, and with the gauge, but not as well. You cannot keep these cocks open; they are liable to stop up. But a water-glass has got so much bigger opening here than the gauge cock. They are the safest thing at all, as they do not stop up like gauge cocks—like all of the gauge cocks I have seen." He further stated that the mud could not be blown out if the gauge cocks are packed with it. He said much more in regard to this feature of the case, but the above references to his testimony are sufficient to demonstrate that the case was one for the jury on the question of assumption of risk or contributory negligence.

A motion to nonsuit, or a request for a peremptory instruction to find for the defendant, requires that the evidence should receive the most favorable construction for the plaintiff, and, under our rule, the evidence only that sustains his cause of action should be considered, because the jury might adopt it and reject all the unfavorable testimony. "It is well settled that, on a motion to nonsuit or to dismiss under the statute, which is like a demurrer to evidence, the court is not permitted to pass upon the weight of the evidence, but the evidence must be accepted as true and construed in the light most favorable to the plaintiff, and every fact which it tends to prove must be taken as established, as the jury, if the case had been submitted to them, might have found those facts upon the testimony." *Brittain v. Westall*, 135 N. C., 492, citing *Purnell v. R. R.*, 122 N. C., 832; *Hopkins v. R. R.*, 131 N. C., 163. More recent cases, affirming the principle, are *Freeman v. Brown*, 151 N. C., 111; *Morton v. Lumber Co.*, 152 N. C., 54; *Johnston v. R. R.*, 163 N. C., 431; *Lloyd v. R. R.*, 166 N. C., 24; *Trust Co. v. Bank*, *ibid.*, 112. The rule of the Federal courts as to the right of the judge to suggest what the verdict should be does not apply to a case tried in the State court, even where the cause of action is given by a Federal statute like the Employers' Liability Act. The power to advise the jury as to their verdict is not equivalent to the right to direct a verdict or to nonsuit, or to dismiss the action. Congress, having conferred concurrent jurisdiction on the State courts in such cases, did not undertake, if it had the power to do so, to regulate the procedure and practice in those courts. The plaintiff might elect to sue in the State court, and if he did so elect, it was, of course, intended that the suit should be tried according to the local practice and procedure. *Fleming v. R. R.*, 160 N. C., 196. It would be anomalous to try a case in the State court according to a procedure foreign to its jurisdiction. We take it, therefore, that on motion to nonsuit, the evidence, with reference to its probative force and its construction, must be considered with due regard to our practice, as it relates to the remedy. *Florida v. Anderson*, 91 U. S., 667. And this is clearly so where there is no rule on the same subject prescribed by act of Congress creating the

right, or where the State rule does not conflict with any such law. *Re Fisk,* 113 U. S., 713. The same is the rule as to evidence, *Ryan v. Windley,* 1 Wall. (U. S.), 66; as to a discontinuance, *Coffee v. Planters Bank,* 13 How. (U. S.), 183; as to what is a material variance, *L. and L. and G. Ins. Co. v. Gunther,* 116 U. S., 113, and, of course, as to the construction of pleadings upon the question of their sufficiency, *Chouteau v. Gibson,* 111 U. S., 200. Many other examples might be stated which would illustrate to what a great extent the highest Federal court has gone in conforming the practice, pleadings, forms and modes of proceedings, as near as may be, to those of the State courts, both under the Federal statutes and under the general rule applicable to such questions. If, therefore, we follow this rule of procedure, the court cannot, under our decisions, consider the testimony of David Campbell, the defendant's witness, or any other part of the testimony offered in its behalf, when passing upon the motion for a nonsuit, except in so far as such testimony favors, or tends to establish, the plaintiff's right to recover; and this rule applies also to defendant's request for a special instruction to the effect that, if the jury believed the evidence, they should answer the issue as to assumption of risk in the affirmative.

But even if the practice and procedure of the Federal courts are applicable, there is ample evidence, as the record shows, to require the submission of the case to the jury, as it will appear by reading the testimony that the choice between a safe method of running his engine and a dangerous one was not left to the plaintiff. Both methods were dangerous. The glass water gauge was safer, in one respect, than the gauge cocks, because it recorded the height of the water in the boiler more accurately and was more likely to prevent an explosion of the boiler, while it presented an element of danger itself because of the absence of the guard-glass, and the gauge cocks were dangerous because they did not gauge the quantity of water in the boiler with accuracy, and, having a small tube and being of a different construction, they were liable to be stopped up by mud and sediment in the water. The jury only could decide what a man of ordinary prudence would have done in the circumstances. Whether plaintiff reported the defect in the water gauge and was told that it would be repaired was certainly a question for the jury to decide, in the conflict of testimony. Some extracts from the testimony will, I think, fully sustain these views:

The plaintiff, James T. Horton, testified: "I told Powie Matthews that the guard glass was gone, and asked him if he had any of them. He was the day roundhouse foreman, and he said no, they did not have any here. I told him the guard glass to the water-glass was gone, and he said they did not have any and did not keep them in stock, and they were in Portsmouth, but he would send to Portsmouth and get one. He said, 'You will have to run her like she is.'"

Powhatan Matthews testified: "I was asked the question as to whether Mr. Horton reported the absence of that glass, and said, 'I do not remember,' and I do not. That is as far as I go and is as far as I know. *I do not remember. I do not deny it.*"

Edgar W. Barbee testified: "As to the duty of an engineer in respect to obtaining a guard glass or flag or torpedoes, fuses, or anything of that nature, or oil cans, from the storeroom, I would tell the foreman I did not have it. It was customary to send the fireman for it. The requisition would come from the foreman. The foreman would send the article to me. I would put it in myself. You would drop it in just like you put a quarter in a slot machine. . . . Yes, they do pay attention to verbal requests. Yes, you can, that way, send your fireman and get a guard glass, if they have them in stock."

J. A. Massey testified: "I had charge of the storeroom. . . . I know who applied for them (guard glasses); the engineers did. They would apply to the master mechanic, general foreman, or the foreman. The glass in the Buckner glass was a *supply*. I did not have any Buckner water guard glasses in stock down there on 4 August, 1910. I did not have any between 27 July and 4 August. . . . If the engineer wanted a lamp, or flag, or a torch, or torpedoes, or a piece of glass to drop into one of these guards, he would report it to the master mechanic, or the general foreman, or the foreman, and ask him for a requisition for whatever article he wanted, and bring that requisition to the storeroom, and he would get that directly and not through the written report of the engineer for repairs."

This evidence shows that defendant had notice that the guard glass was missing; that plaintiff had exercised care and diligence in restoring it, and that he had complied with the rules of the company. The plaintiff testified: "I did not say with pressure on that tube in the glass case that the water-glass is liable to explode at any time. No, that is not so. I have run those a year without their exploding. . . . No, I did not know if it did explode without the guard glass that it would be liable to hurt the engineer, as I have seen lots of them explode without hurting the engineer. . . . Yes, you can operate an engine without a water gauge, with water cocks, but not as well, as you cannot keep these cocks open; they are liable to stop up. But a water-glass has not so much bigger opening here than the gauge cock. They are the safest things at all, as they do not stop up like the gauge cocks—like all of the gauge cocks I have seen. . . . I did not attempt to cut it off. I needed it. I did not attempt to run my engine without it."

Ernest Horton, on this point, testified: "It may last a day, a week, a month, or a year, and it may last an hour or shorter. . . . Would it be the proper thing, in the event there was no guard glass on the water gauge, to shut off the water-glass and run the engine with a gauge cock?

Answer: The proper way, in my opinion, would be to run with the water-glass turned on. . . . What is the proper and safe thing to do? Answer: The proper way, in my opinion, would be to run with the water-glass turned on. . . . I have not had one (gauge glass) to explode with me in the last year, to my knowledge. . . . In case it does not leak, I do not shut it off."

Edgar W. Barbee, witness for defendant, testified: "Yes, it is true that engineers on the Seaboard run their engines out with the water-glass, without cutting it off, with the guard glass missing, prior to the time Mr. Horton was injured."

From this and much testimony of the same character, it is apparent that not only one, but many trips might be safely made with a water gauge unprotected by a guard glass or shield. A pregnant circumstance, which was in evidence and for the jury's consideration, was the fact that the fireman, W. S. Benton, a witness introduced by the defendant, testified that he knew that the guard glass was broken; that in fact he was the man who broke it, as he started out on the first trip with the plaintiff, and that he did not call it to his attention, and that he sat directly in front of the water gauge during the entire trip to Aberdeen and the return trip from Aberdeen to Raleigh. That he made the second trip, also, and likewise faced the same unprotected water gauge, and did it again upon the return trip, and that he made the third trip from Raleigh to Aberdeen and again faced the unprotected water-glass, and that this explosion and injury to the plaintiff occurred on the return from the third trip to Aberdeen, and that he did all of this without thinking of being hurt.

These quotations from the testimony are made at random. A careful examination of it will disclose that there was a conflict of testimony upon the material issues, which, of course, takes the case to the jury.

A. A. SPENCER v. T. M. BYNUM AND B. E. SMITH.

(Filed 12 May, 1915.)

1. Pleadings—Evidence.

The introduction of evidence as to the terms agreed upon by partners in dissolution of their business is not objectionable for the want of allegation in the pleadings, when the testimony objected to is practically set out therein.

2. Appeal and Error—Objections and Exceptions—Harmless Error.

The introduction of inadmissible evidence is rendered harmless when other evidence of the same character has been introduced on the trial without objection.

3. Contract, Written—Parol Evidence.

Where a contract which the law does not require to be in writing is partly written and partly rests in parol, evidence of the parol agreement is competent to show the entire contract when not contradictory of the written part.

4. Same—Partnership—Dissolution.

A written agreement for dissolution of a partnership providing that one of the partners should take charge of the assets, apply them to payment of debts, and distribute the balance among the partners, is not varied by a parol contemporaneous agreement that each of the partners should lose any amount then due him by the firm.

5. Same—Consideration.

An agreement between partners for dissolution of the firm, that one of them shall take charge of the business for that purpose, another buy certain of its property to enable the firm to pay its debts, and that a charge for mismanagement against a third partner would not be made, affords a sufficient consideration to support the agreement.

APPEAL by plaintiff from *Adams, J.*, at September Term, 1914, of RANDOLPH.

Action to recover certain sums of money which the plaintiff alleges he advanced to a partnership of which the plaintiff and the defendants were members.

The action was tried before a referee and was heard in the Superior Court upon exceptions to the report.

It appears from the record that the plaintiff and the defendants formed a partnership on 5 September, 1908, for the manufacture of lumber; that the plaintiff was in active charge and management of the business of the partnership and that the defendants did not live where the business was carried on; that the business of the partnership was carelessly handled, in that accounts were not carefully and properly kept, a great deal of timber was injured by permitting logs to remain in the woods too long after being cut, much lumber was damaged by being improperly cared for, and the partnership sustained damage by reason of these facts in the amount of about $3,000; that the partnership continued under the management of the plaintiff until 28 October, 1909, when an agreement was entered into between plaintiff and the defendants for its dissolution.

The referee finds in finding of fact No. 4 that the plaintiff advanced to the partnership the sums of money which he is seeking to recover, and his findings of fact Nos. 8 and 9 are as follows:

8. On or about 28 October, 1909, the plaintiff and defendants entered into an agreement to close out the partnership affairs and dissolve the business according to the following terms: The defendant T. M. Bynum purchased and paid for the planer plant at Osgood and the lot and houses there at the price of $3,000, and the sawmill on the Black Jack tract at $1,000, the stock of goods on hand at cost, less a discount of 10 per cent,

estimated to amount to $3,000, and the Black Jack tract of timber and another small tract of the Brown timber for $7,500, agreeing to make the arrangements satisfactory with the Moffitt Iron Works, their principal creditor, which he did, and with the understanding and agreement, made and entered into at the time, that each member of the firm should lose what he had paid into it, embracing the sums set out in foregoing article 4, and when they should get through paying all firm debts divide any remainder one-half to Spencer, one-fourth to Bynum, and one-fourth to Smith; and also as a part of the agreement at that time it was arranged that the said T. M. Bynum was to have full management and charge of the assets of the company to wind up the affairs of said copartnership; and the said T. M. Bynum did, as a matter of fact, take charge of the property of the firm according to said agreement, has paid its outstanding debts and has paid certain sums of money to the parties hereto in proportion to their several interests.

9. That prior to entering into the aforesaid arrangements on 28 October, 1909, the said A. A. Spencer, at the request of the defendants, had made two statements of the liabilities of the company. According to the first of these, the liabilities of the company amounted to the sum of $18,648.42, which the plaintiff A. A. Spencer represented to be a full statement of the liabilities of the partnership, so far as he could remember. According to the second of said statements, which was made on 28 October, 1909, the liabilities of the company were placed by him at the amount of $22,791.53, which the plaintiff again represented to be full and complete, so far as he could remember; and in making said statements the plaintiff used the books of the company kept by him and under his direction. In neither of these statements, nor at any time on or before 28 October, 1909, did the said Spencer make any personal claim against the partnership, and at the time of said statements the said Spencer did not intimate, and the said defendants did not know, that any money whatever was due the plaintiff by the firm, and the said defendants entered into the agreement on 28 October, 1909, for settlement and dissolution of the partnership affairs in the *bona fide* belief that the said firm was not in any amount indebted to the plaintiff. That said statements of indebtedness made by the plaintiff were not full and complete in other respects, there being a number of items of considerable amount which were not embraced therein.

At the time the agreement of dissolution was entered into, the parties thereto entered into a written agreement giving to the defendant Bynum the exclusive right to take charge of the business and close it up and then to make settlement with the copartners according to their respective interests.

It was also agreed orally that the defendant Bynum would purchase certain property belonging to the partnership at agreed valuations aggre-

gating $14,500, in order that the purchase money might be used in settling the debts of the partnership, and that each member of the firm should lose what he had paid into the partnership.

Some of the evidence admitted for the purpose of proving this oral agreement was objected to by the plaintiff upon the ground that the allegations of the answer were insufficient, and, further, because it tended to vary the written agreement.

The assignments of error are as follows:

1. That the referee and his Honor erred in permitting evidence to be introduced as set out in exception 1, as follows:

"Q. What agreement about the $2,000 to be paid to Moffitt? A. Mr. Spencer said he would lose right smart by doing that, but said he would do it. I told him he had gotten more than $2,000."

2. That his Honor and the referee erred in permitting evidence to be introduced as set out in exception 2, as follows:

"Q. What was the agreement in regard to that? A. The agreement was, we would put—every man would lose what he had put in, except what was left."

3. That his Honor and the referee erred in permitting evidence to be introduced as follows:

"Q. He would lose his $2,000 he had paid, also? A. Just make a clean sweep of it."

4. That his Honor and the referee erred in permitting evidence to be introduced, as set out in exception 4, in regard to what was the agreement of dissolution.

5. That his Honor and the referee erred in permitting evidence to be introduced, as set out in exception 5.

6. That his Honor erred in overruling plaintiff's exceptions, as set out in the record, and for rendering judgment for only the sum of $51.50, as set out in exception 6.

There was a judgment in favor of the defendants, and the plaintiff appealed.

T. J. Jerome, John T. Brittain, and J. A. Spence for plaintiff.
Hammer & Kelly for defendants.

ALLEN, J. The eighth and ninth findings of fact are determinative of the controversy between the plaintiff and the defendants, and we have no power to disturb them, if the allegations of the answer are sufficient to justify the admission of evidence upon which they are based, and if the evidence introduced is competent.

An inspection of the answer shows that it alleges the agreement entered into at the time of the dissolution of the partnership in almost the same words that are used by the referee in his finding of fact, and we must therefore hold that the answer is sufficient.

We might dispose of the exceptions to evidence set out in the assignments of error upon the ground that the evidence objected to is immaterial and its admission harmless, because it appears from the record that the defendants offered ample evidence of the agreement that was not objected to, and this evidence embraced in the assignments is only as to two or three circumstances which could not reasonably have affected the result, but in our opinion all of the evidence tending to prove the oral agreement was competent and comes within the principle stated in *Nissen v. Mining Co.,* 104 N. C., 310, and approved in *Anderson v. Corporation,* 155 N. C., 134, that "When a contract is not required to be in writing it may be partly written and partly oral, and in such cases when the written contract is put in evidence it is admissible to prove the oral part thereof."

The written contract introduced in evidence does not purport to contain the entire agreement, and is devoted exclusively to clothing the defendant Bynum with the power and the authority to take charge of the assets of the partnership and apply them to the payment of debts and to distribute any balance among the partners, leaving in parol the agreement among the partners that they would lose any amount due by the partnership to either one of them, and by proving the parol agreement the written contract is not changed or varied, and may be enforced as it is written.

This disposes of the first, second, third, fourth, and fifth assignments of error, and the sixth assignment is formal, being entered for the purpose of preserving the other exceptions.

It was also urged upon the argument that the agreement embodied in the eighth finding of fact could not be enforced because there was no consideration to support it, and conceding that this question may be presented by the exception to the judgment, we think the position cannot be maintained.

In *Institute v. Mebane,* 165 N. C., 650, the Court approved a quotation from 9 Cyc., 312, that "There is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has the right to do, whether there is any actual loss or detriment to him, or actual benefit to the promisee or not," and upon this principle the mutual promises for a dissolution of the partnership, the agreement of the defendants to forego any claim against the plaintiff on account of his mismanagement of the business of the partnership, and the agreement upon the part of the defendant Bynum to purchase a large part of the property of the partnership for the purpose of enabling the partnership to pay its debts, although he paid no more than its value, furnish a consideration sufficient to support the agreement.

The action has been tried by a careful and accurate lawyer acting as referee, and his findings and rulings have been reviewed and approved by an impartial and learned judge, and upon an inspection of the whole record we find no reason for disturbing the conclusion they have reached.

Affirmed.

R. P. TAYLOR AND WIFE, BETTIE TAYLOR, v. JOSEPH F. MEADOWS ET AL.

(Filed 28 April, 1915.)

1. Pleadings—Allegations—Title to Lands.

Where the plaintiff alleges in his complaint that he is the owner of certain lands, which is denied by the defendant, he is entitled to recover them upon the strength of any superior title he may have thereto which he is able to establish.

2. Same—Deeds and Conveyances—Devises—Tenants in Common—Evidence—Estoppel.

An owner of lands mortgaged a part thereof, the mortgage was foreclosed, and the *feme* plaintiff acquired a deed as purchaser at the sale. The defendant claimed from the same owner a part of the original tract by mesne conveyances. The lands of both parties were either adjoining or adjacent to each other. The plaintiff further put in evidence the will of the original owner disposing only of personal property, testifying that male plaintiff was one of the heirs at law. The plaintiff testified on the trial that in establishing the true divisional line under the descriptions in the foreclosure deed to *feme* plaintiff she would be the owner of the *locus in quo*. *Held*, the plaintiff was entitled to recover his interest in the lands as one of the heirs of his father as tenant in common with the other heirs, if the foreclosure deed did not cover the lands in dispute; and is not concluded by his testimony that the land was included in the boundaries of said deed, and it was reversible error for the trial judge to charge the jury that his right of recovery depended entirely on the question raised by the issue as to the location of the true divisional line, according to the foreclosure deed.

3. Actions—Tenants in Common—Title Denied—Recovery.

A tenant in common may recover his interest in the lands held in common, on denial of his ownership, and, as against a trespasser who is a stranger to the common title, he may in proper instances be allowed to recover the entire property.

APPEAL by plaintiff from *Rountree, J.*, at November Term, 1914, of GRANVILLE.

Civil action to recover a narrow strip of land abutting 30 to 35 feet on Williamsboro Street in the town of Oxford, and on complaint by R. P. Taylor and wife, Bettie Taylor, alleging generally that they were owners of the land in controversy, describing it, and that defendants were in the wrongful possession of the same, and answer of defendants

denying the allegations. Among other testimony, the will of L. C. Taylor, father of male plaintiff, was put in evidence, in terms as follows:

(1) I appoint my son, Richard P. Taylor, executor of my estate.
(2) After my death, that all my just debts be paid, and if there is any money remaining, that a neat monument be placed at the head.
(3) That the balance be divided equally between Charles A. Taylor, Mrs. R. L. Hines, James A. Taylor, and Richard P. Taylor.

LEONIDAS C. TAYLOR.

In the opening portion of his Honor's charge he instructed the jury as follows: "It is admitted that the land originally belonged to Dr. L. C. Taylor, and his will has been put in evidence. As I remember it, the will devised the property, or provided that the property should be divided among his children. There has been no evidence introduced before you as to whether or not that went to Mr. Taylor, or to any other of the heirs of Dr. Taylor. In the absence of that evidence, the burden being upon him, his title would fail upon that ground, and he would only be entitled to recover upon the ground of the deed from Crews, or deed to Mrs. Taylor. The question for you to decide is whether plaintiff has shown to you by the greater weight of the evidence whether this strip or any portion of it is covered by the deed from Crews to Taylor. If it is, answer the issue 'Yes'; if it is not, answer the issue 'No.' If you don't know how it is from the evidence, and your minds are left in doubt, you should answer it 'No.'"

On issues submitted there was verdict for defendant. Judgment accordingly, and plaintiff excepted and appealed.

R. W. Winston, Jr., for plaintiffs.
Hicks & Stem, B. S. Royster for defendants.

HOKE, J. There were facts in evidence tending to show that in 1880 Dr. L. C. Taylor, father of male plaintiff, owned a large lot of land in the town of Oxford, abutting on Williamsboro Street, and in that year he conveyed a half acre of same, thereafter known as the prize-house lot, extending 135 feet along said street and lying east of his residence lot, to Walter Biggs, and the lot has passed by successive conveyances to Kader Biggs, to J. M. Currin, and then, by commissioner's sale and deed, to defendant Meadows, who is now in possession, claiming to be the owner and that his deeds cover the land in controversy; that in 1881 L. C. Taylor mortgaged the remaining portion of his land, or what he intended to be the remaining portion, the description not being by metes and bounds, and in 1893, on foreclosure sale, the land was conveyed to *feme* plaintiff, Bettie Taylor, purchaser at the mortgage sale, and in this

deed there were descriptive words tending to show that the divisional line between the properties was regarded by the parties as the "yard fence of L. C. Taylor."

There were further facts in evidence on the part of plaintiffs tending to show that the correct divisional line between the properties was 30 to 35 feet east of this yard fence and leaving the strip of land in controversy on plaintiffs' side of the line, also that the true location of the successive deeds conveying the prize-house lot, beginning with that from L. C. Taylor, did not cover the land in controversy.

On this testimony, the proof showing further that L. C. Taylor had died leaving male plaintiff and three others as his children and heirs at law, and the will making no disposition of the land, we are of opinion that reversible error was committed in restricting plaintiffs' right of recovery to the land conveyed to *feme* plaintiff under the foreclosure deed, for although this deed may not have included the land sued for, there were facts in evidence permitting the conclusion that the male plaintiff, as heir of his father, was entitled to recover the land, or at least his interest in it. It is well established that a tenant in common, on denial of his ownership, may recover his interest and, as against a trespasser who is a stranger to the common title, he may at times be allowed to recover the entire property. *Moody v. Johnston,* 112 N. C., 804; *Allen v. Salinger,* 103 N. C., 14. And the allegations of ownership in the pleadings being general in their nature, the plaintiffs should have been allowed to proceed upon any title that they could establish on the testimony. *Davidson v. Gifford,* 100 N. C., 18. In the case cited the principle is stated as follows: "When the complaint in ejectment does not set up any particular evidence of title in plaintiff, or that plaintiff claims under any specified title, the plaintiff is at liberty, on the trial, to prove title in himself in any way he can, allowed by law." And the position is not affected by the fact that Dr. Taylor's widow may also survive, him, for, until dower allotted, the title descends to the heirs of the owner. *Fishel v. Browning,* 145 N. C., 71.

It is alleged for defendant that the male plaintiff claimed on the witness stand that the deed to his wife covered the property in dispute, and testified to facts tending to show it, and insisted on his right to recover on that theory; but this may not be allowed to affect the result. The witness, no doubt, believed that the deed to his wife covers the property, and testified in that belief, but the fact that he did so should not be held as a retraxit or as an estoppel preventing him from recovery on any title shown forth in evidence.

There is error in the ruling, as indicated, and the issue must be submitted to another jury.

New trial.

H. L. HALLMAN v. SOUTHERN RAILWAY COMPANY.

(Filed 19 May, 1915.)

1. Carriers of Passengers—Shortest Route—Ejection of Passenger—Passenger Misled.

Where a passenger on a railroad train buys a mileage book, exchanges his mileage for a ticket to his destination upon the assurance of the local agent that the train would make connection at a certain junction en route the shortest distance, but, if not, his ticket would carry him by another connection over a longer route, which latter he attempts to take upon failure of the promised connection, and he is ejected from the train upon his refusal to pay the difference in money for the longer distance, after the defendant's conductor had been informed of the circumstances, it is held that the ejection was wrongful, notwithstanding the ticket read that the journey was to be made by the shortest route.

2. Same — Contracts — Issues — Instructions—Appeal and Error—Harmless Error.

Where a passenger is misled in buying a ticket to his destination by the assurance of the local ticket agent of a railroad company into believing that he could go by a certain route, when his ticket specified by another and shorter one, and in consequence, upon refusing to pay upon the train the difference in the mileage in money, he is ejected from the train, and in addition to a favorable finding upon this issue the jury have found that the local agent had contracted with the plaintiff that he could take the longer route if he failed to make connection on the shorter one, but from the other issues, under a correct instruction, it appears that the case turned solely upon the question of the plaintiff having been misled, the questions of the authority of the local agent to make the contract, or of unlawful discrimination, become immaterial, and will not be held for reversible error.

3. Trials—Improper Arguments—Error Corrected—Appeal and Error—Harmless Error.

Improper arguments by counsel to the jury will not be regarded as reversible error when it appears that upon objection the trial judge stopped the argument and withdrew the matter from the consideration of the jury in unmistakable terms.

APPEAL by both parties from *Long, J.*, at November Term, 1914, of CATAWBA.

Action to recover damages, the plaintiff alleging that he bought a ticket from the agent of the defendant at Hickory on 18 August, 1913, for Winston-Salem by Barber's Junction, and that the agent guaranteed the connection at said junction; that he failed to make said connection, and after leaving said junction was wrongfully ejected from the train.

These allegations were denied by the defendant.

The plaintiff offered evidence tending to prove that on 18 August, 1913, he went to the office of the defendant at Hickory and told the agent of the defendant that he wanted a mileage book if he could make the connection at Barber's Junction, and if not, he would not buy one on that day; that the agent assured him that he would make the connection

at Barber's Junction, and he then bought the mileage book, 86 miles of which was exchanged for a ticket from Hickory to Winston-Salem by Barber's Junction; that in a short time he noticed that the train to leave Hickory was marked late, and he then returned to the ticket office and asked the agent if he was sure the connection would be made; that the agent assured him that he would make the connection at Barber's Junction, but that if he failed to do so, he could go to Winston-Salem the longer route, by Greensboro, on the same ticket; that he would guarantee the connection; that he relied upon this assurance of the agent and entered the train of the defendant; that when the conductor on the train took up his ticket he asked the conductor if the connection would be made at Barber's Junction, and was assured that it would be; that when within about 2 miles of Barber's Junction the conductor told him that the train which he expected to take at that point had gone, and that he, the plaintiff, would have to go round by Greensboro to get to Winston; that he relied upon the assurance of the agent that he could go to Winston-Salem by Greensboro on the ticket he had bought, and procured no other ticket; that as the train was leaving Barber's Junction for Greensboro the conductor came to him and demanded 55 cents, the difference in fare in the two routes to Winston-Salem; that he then told the conductor of the assurance of the agent at Hickory that if he failed to make his connection at Barber's Junction he could go by Greensboro on the same ticket; that he tendered to the conductor his mileage book and asked him to take out the additional miles, which he refused to do; that he requested the conductor to permit him to go back to the office at Barber's Junction and have mileage taken for the difference in the two routes, or that he permit him to have the extra mileage taken by the agent at Salisbury; that these offers were refused, and he then tendered to the conductor his whole mileage of 914 miles, which was refused; that the conductor thereupon ejected the plaintiff from his train on account of his refusal to pay the extra fare of 55 cents.

There was evidence on the part of the defendant contradicting the evidence of the plaintiff.

The defendant objected to the evidence offered by the plaintiff, tending to prove that the agent at Hickory guaranteed the connection at Barber's Junction, insisting that the agent had no authority to make such a contract, and that the contract, if made, was invalid because a discrimination.

The jury returned the following verdict:

1. Did defendant's ticket agent at Hickory, North Carolina, enter into a contract with the plaintiff in behalf of the defendant, guaranteeing a connection at Barber's Junction for Winston-Salem? Answer: "Yes."

2. Did the defendant wrongfully eject plaintiff from the train at Barber, as alleged? Answer: "Yes."

3. Did the defendant assault the plaintiff by pushing him from the steps, as alleged in the complaint? Answer: "No."

4. What damage, if any, is plaintiff entitled to recover? Answer: "$400."

There was a judgment in favor of the plaintiff, and the defendant appealed.

A. A. Whitener for plaintiff.

S. J. Ervin for defendant.

ALLEN, J. There is authority sustaining the contention of the plaintiff, that an agent of a common carrier, authorized to sell tickets, has an implied authority to guarantee connection (*Foster v. R. R.*, 56 Fla., 435; *Hayes v. R. R.*, 31 L. R. A. (N. S.), 229), and also authority in support of the position of the defendant that a contract of this character is unlawful because it does not afford equal opportunities and advantages to all of the patrons of the common carrier (*R. R. v. Kirby*, 225 U. S., 155); but it is not necessary for us to pass upon these questions, as in our opinion no error was committed in the trial of the second issue, and the jury was not permitted to consider any element of damage under the fourth issue, which the plaintiff would not have been entitled to recover on account of being wrongfully ejected from the train, and the findings upon these two issues are sufficient to support the judgment.

The finding upon the first issue, therefore, has no materiality except as it may tend to show that the jury accepted the plaintiff's version of the occurrence at Hickory; but this sufficiently appears from the finding upon the second issue, when read in connection with the charge.

His Honor, among other things, charged the jury upon this issue as follows: "The plaintiff contends that he made inquiry of Mr. Miller as to whether the passenger train No. 22 made connection at Barber's Junction with the train running from Charlotte by way of Barber's Junction to Winston-Salem, and he contends that in this inquiry Mr. Miller told him that he would make connection at Barber's Junction; he contends and alleges that he relied upon the assurance given him by Mr. Miller, and, after buying a mileage book, that the book was pulled from Hickory to Winston and that he received a ticket from Hickory to Winston-Salem in exchange for the mileage that he pulled; and he alleges and contends that some time after that Mr. Miller stated to him he would guarantee he would make connection at Barber's Junction on this train, No. 22, and that, relying upon this assurance, he boarded train No. 22 when it came to Hickory and became a passenger thereon; and he contends that when the train reached a point a few miles from Barber's Junction that the agent of the defendant, the ticket collector, gave him information that he would not make his connection at Barber's Junction for Winston

and that he would be required to pay the sum of 55 cents in cash in order to continue his journey by way of Salisbury and Greensboro to reach Winston; and he contends that when this was called to his attention by the auditor, that he informed him of what had happened between himself and Mr. Miller at Hickory, and that after his talk with the conductor and the ticket collector they still insisted he would have to pay 55 cents in order to continue his journey. He contends, also, that after making known to them what had occurred between himself and Mr. Miller, and after they made demand upon him that he pay 55 cents in cash, that he informed the auditor and conductor, one or both, that he was willing to let them have a sufficient number of miles off of his mileage book with which to make the sum demanded of him, towit, 55 cents; he also contends that in his interview he offered to let his book be pulled to Barber's Junction in order to make up this 55 cents; also that he made an offer that if they would let him ride to Salisbury, his mileage book might be used there so that enough could be pulled from the book to make up the 55 cents; but he says these offers made by him to use the book and take the mileage off of it instead of cash were refused by the conductor and ticket collector, and he insists you ought to find from the evidence also that under these circumstances, when he got to Barber, the train not being there for him to go on the short route, that they should not have put him off the train, but allowed him to go on, under the circumstances, by way of Salisbury and Greensboro, he insisting that if there was not actually a contract between himself and the agent, Mr. Miller, at Hickory, except as was understood by both him and Miller, nevertheless that he was misinformed and misdirected, and the conditions at Barber were erroneously represented to him by Mr. Miller, and therefore that he should not have been held to the exact terms of the contract as expressed on the ticket and put off the train. He, therefore, insists that he was wrongfully put off the train and that you should answer the second issue 'Yes.'

"If the plaintiff has satisfied you by the greater weight of the evidence that his contentions to which I have called your attention are true, and that although this ticket was issued having upon it the terms that it does, that it was good for transportation by way of the short route, that is to say, by way of Barber, and if you further find that he was actually misled at the time Mr. Miller issued the ticket to him by the erroneous representation, misdirection, or mistake of Mr. Miller at that time, that is to say, the time he boarded the train, and that thereby he was caused to become a passenger on the train; and if you further find that the plaintiff was not advised or informed as to the connection of this train at Barber otherwise, or could not have been, in the exercise of reasonable care, and you further find that the plaintiff, while he was on the train and when the extra amount of 55 cents was demanded of him, informed

the conductor and the collector, one or both, of what had occurred between himself and the agent, Mr. Miller, at Hickory; and if you further find that the plaintiff then, under those circumstances, after making that explanation and offering to pay the 55 cents extra from his mileage book by the pulling of coupons therefrom at Barber or at Salisbury or on the train, and you find that the conductor would not allow him to do this; if all these facts are found by you as contended by the plaintiff, and by the greater weight of the evidence, then the court instructs you that the conductor would not have been authorized, as the court understands the law, to have put him off the train."

This part of the charge is fully supported by *Mace v. R. R.*, 151 N. C., 404; *Harvey v. R. R.*, 153 N. C., 567; *Dorsett v. R. R.*, 156 N. C., 439; *Norman v. R. R.*, 161 N. C., 330.

In the *Mace case* the following instruction to the jury was approved: "If you find from the evidence that the ticket that has been introduced in evidence is a copy of the tickets which were issued to the plaintiff, and contained the stipulation, 'via the short route and return the same way,' then the plaintiffs would be bound by that, and they would have to go the shortest route and return the same way, unless the agent who sold them the tickets at Rock Hill told them that they were good by way of Marion as well as by way of Statesville and Charlotte; if the agent told them that, and the plaintiffs did not know which was the shortest route, and could not by reasonable diligence have ascertained that, then they had a right to rely upon the statement made to them by the agent at Rock Hill, and if, under these circumstances, they went to Hickory, and, in order to ascertain whether they could go on the train to Marion, applied to the agent at Hickory, and he confirmed the statement that was made by the agent at Rock Hill by telling them that they could go back by Marion, then they had a right to rely upon the statement of the two agents, and to return by way of Marion; and if they were ejected from the train after offering that ticket and informing the conductor, then they were wrongfully put off the train, and the defendant would be liable in actual damages, it makes no difference whether the ejectment was with or without rudeness, with malice or without, or wanton or not wanton"; and the facts here are stronger in behalf of the plaintiff, because, after relying upon the statements of the agent, he tendered his mileage book and asked the conductor to take out the extra mileage, which was not done in the *Mace case.*

In the *Harvey case, Justice Hoke,* speaking for the Court, says: "It follows that where by the wrong and fault of the company a lawful holder of a mileage book is prevented from making the exchange required, such holder is relieved of the conditions and his book becomes a complete contract of carriage, unaffected by the restrictions referred to"; and in the *Norman case* the Court, commenting upon the cases previ-

ously decided, says: "The principle upon which *Mace v. R. R.*, 151 N. C., 404; *Harvey v. R. R.*, 153 N. C., 567; and *Dorsett v. R. R.*, 156 N. C., 439, were decided is the same, as in each the railroad was held liable in damages for expelling a passenger, brought about by the mistake of the agent, although the conductor was obeying a rule of the company."

If, therefore, proper instructions were given to the jury upon the second issue, and there is no reason for disturbing the finding upon that issue, and if the answer to that issue alone is sufficient to justify the assessment of damages, we are not called upon to decide the interesting questions discussed in the brief of the appellant unless some element of damage was considered by the jury which was only applicable to the first issue; and when we turn to the charge upon damages, we find that the only matters which the jury was permitted to consider was loss of time, an extra hotel bill, and humiliation, all of which ought to have been taken into consideration by the jury if the first issue had not been presented or considered.

There are three exceptions taken by the defendant to parts of the argument before the jury, but none of them can be sustained, because it appears from the statement of the case that as soon as objection was made, his Honor stopped the argument and withdrew the matter from the consideration of the jury in terms that could not be misunderstood.

We find

No error.

T. C. COXE ET AL. v. MARGARET CARSON ET AL.

(Filed 12 May, 1915.)

1. Trusts and Trustees—Parol Trusts—Long Delays—Evidence—Burden of Proof.

Where a parol trust is sought to be engrafted upon the legal title to lands, that the grantee should reconvey the lands if the profits in operating a gold mine thereon for a reasonable length of time would repay a debt owed by the plaintiff to him, the plaintiff fails to show that the profits would be sufficient within such time where the evidence, as in this case, is too indefinite and uncertain to be submitted to the jury.

2. Trusts and Trustees—Parol Trusts—Repudiation of Trusts—Deeds and Conveyances—Registration—Limitation of Actions.

Where the holder of the legal title to lands conveys the same by deed of trust to another as trustee, with power of sale, and the deed is registered and the *cestui que trust* enters into the possession and use of the lands, the act of such holder is a repudiation of any parol trust which may be sought to be engrafted upon his title, and the statute of limitations commenced to run from the time the alleged trustee had placed himself in this hostile attitude towards the beneficiaries of the parol trust.

3. Trusts and Trustees—Married Women—Interpretation of Statutes—Limitation of Actions.

Chapter 78, Laws 1899, brings a married woman within the operation of the statute of limitations, and she may be barred thereby from asserting her rights as a beneficiary under a parol trust in lands.

4. Trusts and Trustees—Parol Trusts—Laches—Presumptions—Equity—Evidence.

Where a party to a suit to establish a parol trust in lands has delayed for an apparently unreasonable period of time to assert his rights after knowledge of a repudiation thereof by the holder of the legal title, it is necessary for him to clearly establish the trust relation, and in order for him to have a reasonable and legal excuse for the delay he must show a fraudulent concealment of the facts from him materially relating to his rights, due diligence on his part, etc.; and equity will not interfere in his behalf, or rebut the presumption that the trusts have been satisfied, in the absence of his explanation for the delay, especially when the adverse party is deprived thereby, as, for example, by the loss of important evidence, of ascertaining the nature of the original transaction, or of evidence to disprove the existence of the trust relation sought to be established.

5. Vendor and Vendee—Defeasible Purchase—Mortgages—Mortgagor's Possession—Limitation of Action.

Where one has taken the title, possession, and use of lands upon the agreement that if the profits are sufficient to pay off a certain debt owed to him within a reasonable time he will make a reconveyance of the lands to the borrower the transaction is in the nature of a defeasible purchase; but if construed as a mortgage in this case, *semble*, the lender's possession thereunder for ten years will bar the borrower's right of action as mortgagor.

6. Limitation of Actions—Mortgagor's Possession—Equity—Accounting.

It being held in this case that the defendants are barred by the statute of limitations, and by their laches, in equity, from establishing a parol trust in the plaintiff's lands, it became unnecessary to decide the question whether, under the circumstances, the defendants really held an equity in the said lands, or were entitled to an accounting, or other relief.

APPEAL by defendants from *Long, J.*, at Fall Term, 1914, of BURKE.

This action was brought to quiet title to land under the statute, and to remove a cloud from the same. Plaintiffs, as heirs and devisees of Frank Coxe, allege title to the land, known as the "Brindletown Gold Mines," the interest in one-half of which was acquired by an absolute deed from Joseph C. Mills, Mrs. Margaret Carson, and Mrs. Rachel L. Williams to the said Frank Coxe, dated 22 December, 1880, the said parties being at that time tenants in common of said land. The defendants, Mrs. Carson and the heirs of Mrs. Williams, allege in their answer, and offered proof to show, that the deed to Frank Coxe was taken by him subject to a trust "to develop and improve the land and to receive the issues, rents, and profits thereof, and when he had received from said land the amount of money which he had paid out, with interest accruing thereon, the property was to be conveyed to the makers of said deed; and the said Frank Coxe, prior to the execution of said deed, agreed that

he would take the same and would take charge of said property, develop the same in the best and most practicable way, collect the issues, rents, and profits therefrom, and realize from said property all that the same was capable of producing, and that when the sums of money paid out by him should have been returned to him he would reconvey the property so conveyed to him by said deed to the said Rachel L. Williams and Margaret C. Carson; and that the said Frank Coxe, during his lifetime, held said property upon said trust and upon the agreement and understanding that his executors would reconvey the same to the said Margaret C. Carson and Rachel L. Williams in accordance with their interest as hereinbefore set forth." On 28 March, 1882, Frank Coxe conveyed to Joseph C. Mills an undivided five-twelfths interest in said land, and on 21 February, 1895, Frank Coxe and Joseph C. Mills conveyed the land to George Phifer Erwin in trust to secure the performance of certain covenants entered into by the Piedmont Mineral Company, Limited, which company had agreed to purchase the land for the purpose of mining the same for gold and other minerals. J. C. Mills and the mineral company took possession of the land, claiming it as their own, the said Mills so far as he had an interest in the same, and the possession was afterwards held adversely by Mills, as to his interest. The mineral company worked the mines, but failed to perform its covenants, and finally abandoned their rights under the contract. A few acres of the land were conveyed to May Mills in severalty, and she immediately took possession of the same and has kept possession thereof ever since. The deed of Coxe and Mills to the mineral company was registered in Burke County on 21 February, 1895, and the other deeds were duly registered soon after they were executed.

The plaintiffs denied that any such trust as set up by the defendants had ever attached to their title, and averred that they were the absolute and unconditional owners in fee of the said land. "It was admitted that the said Frank Coxe and J. C. Mills and other persons claiming under them had been in possession of the said lands described in paragraph 3 of the complaint (which are the lands in question), occupying, using, and receiving the rents and profits therefrom from 22 December, 1880, up to the time of the trial. There was also evidence offered tending to show that the property described in paragraph 3 of the complaint was usually known and referred to in 1880 and since that time as the Brindletown Gold Mining property." The plaintiffs also pleaded the bar of the statute of limitations in every form, also the presumption that all equitable right or interest of the defendants in the land, if any ever existed, had been waived and abandoned, and that said alleged equity had been lost by their laches.

The court submitted issues to the jury and directed them to answer the second issue, as to the trust, "No," if they believed the evidence, and

find the facts to be as testified to by the witnesses, which the jury did, and from the judgment entered upon the verdict the defendants appealed.

Bourne, Parker & Morrison and Avery & Erwin for plaintiffs.
Martin, Rollins & Wright and Mangum & Woltz for defendants.

WALKER, J., after stating the case: It is so clear to us, at least, that the defendant's cause of action is barred upon any one of the three grounds we will state, that it becomes unnecessary to consider the case upon the instruction given to the jury as to the second issue. If there was an express trust, the defendants cannot recover on their counterclaim, because, in the first place, it was not to attach to the legal estate in Frank Coxe unless the mines yielded enough clear profit "in any reasonable term of years to pay me (Coxe) back the money I have paid you (Mrs. Carson and Mrs. Williams) and Joe, and whatever else I spend on it, with legal interest." The amount paid by Frank Coxe to the three, Mrs. Carson, Mrs. Williams, and Joseph C. Mills, was $6,000, in December, 1880. There is no legal evidence that the mines yielded such a profit within a reasonable number of years after the said date, but what evidence there is on that question—unsatisfactory, indefinite, and uncertain as it is, in any view—tends to show that no such profit was realized. No court would allow a verdict, finding that there was a sufficient profit, to stand upon any such testimony. It would be bare conjecture and speculation. *Byrd v. Express Co.*, 139 N. C., 273; *Foy v. Lumber Co.*, 152 N. C., at p. 598. The profits from these mines, up to this date, so far as the case shows, would not be sufficient to pay the principal and accrued interest, which would be $21,000 or more, even if we can assume that all the gold referred to in the testimony was taken from these lands, and this does not take into account the cost and expense of machinery and operation or other incidental expenditures.

But, upon another ground, the defendants must fail, even if the trust originally was an express one. The evidence shows that in March, 1882, Frank Coxe sold a five-twelfths undivided interest in the land to Joseph C. Mills, and conveyed to him a fee simple absolute, or without any declaration of trust, and Joseph C. Mills took possession of the land under his deed, and in 1895 he and Frank Coxe united in a deed to George Phifer Erwin, by which they conveyed to him the entire land upon the trusts specified, one of which provided for an absolute sale of the lands to the Piedmont Mineral Company. This deed was registered in February, 1895, just after it was executed, and the mineral company took possession of the property thereunder and conducted mining operations thereon. These were clearly repudiations of the trust, if any such existed, and the statute of limitations commenced to run from the time

that the alleged trustee had placed himself in this hostile attitude towards the beneficiaries of the trust. A reasonable time had then elapsed, that is, in 1895, to thoroughly test the mines for the purpose of determining whether they would yield the contemplated profits. The evidence shows that so much time was not required for that purpose. By act of 1899, ch. 78, marriage ceased to be a disability under the statute of limitations, and married women are no longer exempted from its operation by reason of their coverture. As in 1895 Coxe and Mills had repudiated the trust or considered it at an end by open and notorious acts and conduct indicating an intention no longer to recognize it, and after a reasonable time had elapsed to ascertain if sufficient profits could be realized to repay the purchase money, interest, cost, and expense, the statute then was put in motion, and did not cease to run because of the coverture of Mrs. Carson and Mrs. Williams. There can be no doubt that Frank Coxe and Joseph C. Mills assumed a hostile attitude many years ago, one entirely inconsistent with the idea that they held the land in trust for the defendants or those under whom they claim, and they evinced this hostility to the alleged trust in the most open and notorious manner. In *Badger v. Badger,* 2 Wall. (69 U. S.), 87, the Court, referring to laches and the rule barring the prosecution of stale claims, said, at pp. 94, 95: "Now, the principles upon which courts of equity act in such cases are established by cases and authorities too numerous for reference. The following abstract, quoted in the words used in various decisions, will suffice for the purpose of this decision: 'Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy. In many other cases they act upon the analogy of the like limitation at law. But there is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitation governs the case. In such cases courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, and refuse to interfere, where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor. The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his

case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer.' The bill, in this case, is entirely defective in all these respects. It is true, there is a general allegation that the 'fraudulent acts were unknown to complainant till within five years past,' while the statement of his case shows clearly that he must have known, or could have known if he had chosen to inquire at any time in the last thirty years of his life, every fact alleged in his bill." And in 2 Perry on Trusts (6 Ed. by Howes), sec. 861 and note, it is said: "Equity will not usually lend its aid to establish or enforce a stale trust; and when there has been great delay in bringing suit, even though the trustee has fraudulently concealed the facts from the beneficiary, the latter must definitely set forth in his bill the cause of his ignorance, the impediments to an earlier prosecution of his claim, the means used by the trustee to mislead him, and how and when he acquired a knowledge of his rights," citing cases. To prevent the operation of the doctrine of laches or the staleness of the claim by a court of equity, the trust should be *clearly* established, and there should be some fraudulent concealment by the party affected by it of the facts, and an accounting for long delay in enforcing rights by the *cestui que trust,* and a showing of proper diligence. It was so held in the *Badger case, supra.* In *Paschall v. Hinderer,* 28 Ohio St., 568, 578, cited and quoted from in 1 Perry on Trusts (6 Ed.), sec. 229 and note, at p. 338, it is said that the statute will bar where there has been an open denial or repudiation of the trust, brought home to the *cestui que trustent,* which requires him to act, at the time afterward elapsed amounts at law to a bar, or when circumstances exist which, with the lapse of time, raise the presumption that the trust has been discharged or extinguished. This doctrine of presumption of abandonment of rights, or laches, was adopted for the sake of repose, and because time necessarily obscures all human evidence, and deprives the parties of the means of ascertaining the nature of the original transaction and may close the doors of proof to those who claim under the party charged with the fraud or the assumption of a trust. It would be unfair and inequitable to listen to a party alleging a fraud or a trust after so long a lapse of time, and especially when it appears that the only parties to the transaction are dead, or so disabled by mental and physical infirmities, as in this case, as to deprive the party against whom the trust is asserted of the benefit of their testimony. And in the same case of *Paschall v. Hinderer, supra,* the Court, quoting with approval from *Williams v. First Presbyterian Church,* 1 Ohio St., 478, said: "Although it is true, as a general rule, that as between trustee and *cestui que trust* lapse of time is no bar, yet it is equally true that where the former, with the knowledge of the latter, disclaims the trust, either expressly or by acts that *necessarily* imply a disclaimer, and unbroken possession follows in the trustee, or those

claiming under him, for a period equal to that prescribed in the act of limitation to constitute a bar, *such lapse of time, under such circumstances,* may be relied upon as a defense." This Court affirmed this principle in *McAden v. Palmer,* 140 N. C., at p. 258, and referred to *Speidel v. Henrici,* 120 U. S., at 387, where it was said by *Justice Gray:* "Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. 'A court of equity,' said *Lord Camden,* 'has always refused its aid to stale demands, where the party slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court.' *Smith v. Clay,* 3 Bro. Ch., 640, note. This doctrine has been repeatedly recognized and acted on here," citing many cases.

It appears, therefore, that the statute begins to run when the trust is closed, or when the trustee disavows the trust with the knowledge of the *cestui que trust,* or holds adversely to the claim of those he represented. *Bacon v. Rives,* 106 U. S., at p. 107.

But we think this case shows most clearly that Frank Coxe and Joseph C. Mills so dealt with this property as their own and as free from any trust, and in such an open, notorious, and public manner, and in such a decisive way, as to fix the defendants, or those under whom they claim, with notice. They do not disclaim knowledge of the facts or even attempt to account for their long and protracted delay. The law favors the vigilant, and not those who sleep upon their rights. In this case the plaintiffs and those under whom they claim, and the assignees of the latter, have been in possession of this land all the time, apparently claiming it as their own, without acknowledging any trust or accounting with the defendants or any one else for any of the profits, if any were made. Both Coxe and Mills committed acts which amounted to a distinct disavowal or repudiation of any trust relation between them and Mrs. Carson and Mrs. Williams. It is not alleged or pretended that they have fraudulently or otherwise concealed any facts from the defendants, so as to put them off their guard and to induce their long delay. Those now claiming that there was a trust should have taken notice long ago that the time had arrived for them to assert it, and instead of doing so, they have delayed action until one of the two important witnesses is dead and the other is so feeble in mind and body, with faculties greatly impaired, as to be practically unable to testify. It would not be just or equitable, under the circumstances, to extend the aid of the court to the defendants, and we must decline to do so. The reasons which induce a court of

equity to withhold its aid in such cases are fully given and explained in *Foulk v. Brown,* 2 Watts (Pa.), 216, which was quoted with approval by *Justice Burwell* in *Cox v. Brower,* 114 N. C., 422, and *Justice Hoke* in the case of *In re Dupree's Will,* 163 N. C., 256, as follows: "The rule of presumption, when traced to its foundation, is a rule of convenience and policy, the result of a necessary regard to the peace and security of society. No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined until time has involved them in uncertainty and obscurity, and then ask for an inquiry. Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers are lost or thrown away, and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age, and often regardless of them. Papers which our predecessors have carefully preserved are often thrown aside or scattered as useless by their successors. It has been truly said that if families were compelled to preserve them, they would accumulate to a burdensome extent. Hence statutes of limitations have been enacted in all civilized communities, and in cases not within them prescription or presumption is called in as an indispensable auxiliary to the administration of justice." See, also, *In re Beauchamp's Will,* 146 N. C., 256; *Headen v. Womack,* 88 N. C., 468. It was held in the case of *In re Beauchamp's Will, supra,* that coverture would not prevent the operation of the rule as to long delay and laches. See *Headen v. Womack, supra.*

Plaintiffs contended that defendants could not recover on their counterclaim, because they had not alleged or proved that the clause of defeasance, or the terms creating a trust, had been omitted from the absolute deed by ignorance, mistake, undue influence, or fraud, which they insist is essential, and they relied on *Sprague v. Bond,* 115 N. C., 530; but a decision of this point is not necessary, as we base our conclusion on another and sufficient ground.

This case was submitted to the jury upon the theory that the deed to Frank Coxe and his letters to the two *feme* grantors, constituted a mortgage, as the second issue will show. If this be the true construction, the cause of action was barred by the ten years statute, the mortgagee having remained in possession all the time; but the transaction partakes more of the nature of a defeasible purchase, as the vendors were not debtors to the vendee (*Robinson v. Willoughby,* 65 N. C., 520), and therefore they could not have been sued by the vendee for the amount ($6,000) paid to them. The sale was conditioned on the returns being, within a reasonable time, sufficient to pay him back the purchase money, interest, and all expenses of working the mines, and this did not turn out to be the case. The proposition in the letter of 9 April, 1881, to Mrs. Carson, was never accepted and carried out, and does not, therefore, alter the situation. The letter also shows that Mr. Coxe warned the

vendors not to rely on the condition as to profits, because he was quite sure they would not be realized, but to rely on the money he had paid to them alone, as no mine in this State had been profitable, so far as he knew. We hold, though, that on the ground of laches and long delay (more than thirty years), unexplained, defendants have lost any right they may have had to an accounting. Besides, the evidence does not show that the condition upon which they might redeem or recover the land was ever fulfilled, but tends to show the contrary.

In the discussion we have assumed that defendants had an equity, but it is not necessary to decide this question, as, if it ever existed, it has been lost by their delay and inaction. As said by this Court: "Very certain it is, however, that the judgment of nonsuit should not be disturbed, for though it should be established and declared by a verdict that permanent damage has been done to the plaintiff's estate and interest, it is perfectly clear, both from the allegations of the plaintiff and the uncontroverted facts, that the plaintiff's cause of action is barred by the three-year statute of limitations. The statute being properly pleaded, the error as to permanent damage, if any was committed to the plaintiff's prejudice, was harmless, and no good would result by awarding a new trial." *Cherry v. Canal Co.*, 140 N. C., 425. We, therefore, must affirm the judgment.

Affirmed.

ALLEN JORDAN ET AL. v. J. A. SIMMONS.

(Filed 12 May, 1915.)

1. Tax Deeds—Limitation of Actions—Interpretation of Statutes.

The three-year statute of limitations bars the right of action in favor of a claimant under a tax deed (Pell's Revisal, sec. 2909), and the general statute, Revisal, secs. 390-395 (10), is broad enough to include actions for and against such claimant, and bars the right of action after the time stated in the general statutes from the execution of the tax deed.

2. Pleadings—Tax Deeds—Limitation of Actions.

The three-year statute of limitations in favor of or against the claimant under a tax deed to lands must be properly pleaded to be made available.

3. Tax Deeds—Limitation of Actions—Possession.

Semble, the three-year statute of limitations may not be successfully pleaded by the claimant under the tax deed against the original owner in possession of the lands.

4. Tax Deeds—Purchaser—Husband and Wife.

A wife may become the purchaser of her husband's land under a sheriff's sale for taxes, paying for the same out of her separate funds, and acquire the title as a third person may do.

JORDAN *v.* SIMMONS.

APPEAL by plaintiff from *Adams, J.*, at September Term, 1914, of MONTGOMERY.

Civil action to establish title and recover possession of a tract of land, instituted in May, 1903, and, as it now appears, only Allen Jordan was named in the summons as plaintiff. There seem to be facts in evidence tending to show that it was thereafter prosecuted for both Allen Jordan and his wife, Mary, but there is no entry in the record as it now appears showing that the wife was formally made a party. Both the husband and wife having died, at January Term, 1908, Molly Deaton, heir at law of plaintiffs, and J. M. Deaton, administrator of both plaintiffs, were by formal order made parties plaintiff and, in April, 1910, filed an elaborate complaint, styled an amended complaint, and again amended at August Term, 1914, in which plaintiff alleges ownership of the land, in general terms. (2) That plaintiffs and defendants claim the land under Allen Jordan and alleging facts in impeachment of defendant's claim, on the ground of fraud. (3) That plaintiff is the owner under and by virtue of a tax title in which the land was sold for taxes in May, 1909; was bid off by one G. S. Beaman, the bid assigned to Mary Jordan, and conveyed to her by deed of sheriff, pursuant to the tax sale; the deed bearing date 6 May, 1909.

The defendant denied the ownership of plaintiffs, admitting, in effect, that he had acquired the title through Allen Jordan, denied the allegation of fraud, and pleaded the statute of limitations thereto, and pleaded, further, an estoppel by reason of a judgment in favor of J. P. Leach, the immediate grantor of defendant, against Allen Jordan.

At the close of the evidence, on motion, there was judgment of nonsuit, the case on appeal stating the ruling of his Honor and the reason for it, as follows: "It appearing to the court that the tax deeds introduced by the plaintiffs were executed on 6 May, 1899, and the summons in this action issued 6 May, 1903; because it was not brought within three years of the date of the execution of the sheriff's deed. There being no evidence of fraud, the motion of the defendant is allowed."

Plaintiffs, having duly noted their exceptions, appealed.

W. A. Cochran for plaintiff.
Thomas J. Jerome for defendant.

HOKE, J. In Laws of 1895, ch. 119, sec. 69, it was provided that no action for the recovery of real property sold for the nonpayment of taxes shall lie unless the same is brought within three years after the sheriff's deed is made, etc. The statute contained a proviso giving indication that it was the intent and purpose of the lawmakers that the provision should operate in favor of the claimant under the tax title and against the

original owner, and, so construed, the section and the proviso are brought forward in 2 Pell's Revisal, ch. 72, sec. 2909, being the last clause of the section, and see *Lyman v. Hunter,* 123 N. C., 508. In addition to this, our general statute of limitations, Revisal, secs. 390-395, subsec. 10, contains provision "that an action for the recovery of real property sold for taxes is barred unless the same is instituted within three years after the execution of the sheriff's deed."

This last statute, in terms plain of meaning, is broad enough to include actions both for and against the claimant under the tax title, and, where the facts bring the case within its provisions and the question is properly presented, we think such claimant is also barred after three years from the execution of the tax deed. It is, however, in strictness, a statute of limitations and, as such, comes under the established rule that, in order to be effective, it must be properly pleaded. *Oldham v. Reiger,* 145 N. C., 254; *Guthrie v. Bacon,* 107 N. C., 337.

On careful perusal of the record we find no plea of the statute in this aspect of the case, and the defenses arising thereunder are, therefore, not properly available to defendant on the case as now presented. In addition to this, there is the permissible inference on the facts in evidence that the original owner may have continued in possession of the property until within three years next before action brought, and the general rule is that a statute of limitations rarely operates against one in the enjoyment of the right. *McNair v. Boyd,* 163 N. C., 478.

It was suggested on the argument that a wife is not allowed to acquire a tax title of her husband's property and hold the same for her own benefit, citing *Laton v. Balcum,* 64 N. H., 92.

It may be that a husband, in the management and control of the wife's property, is not allowed to buy in her property at a tax sale, without her knowledge and consent, and hold same adversely to her. Such conduct might very well be considered such a breach of duty on his part as to render his purchase of none effect against the wife's ownership. But we are not impressed with the position as applied to the facts of this case, and we see no reason, when a husband's property is sold for taxes, why a wife should not be allowed to purchase for her own benefit. The case is referred to in Black on Tax Titles, sec. 286, and while the author appears to give the general principles, announces his approval, and quotes extensively from the opinion, he seems to be somewhat hesitant about the position, and also quotes from an Indiana case as follows: "It seems to be settled law that a husband, whose duty it is to look after the business interests of his wife and family as well as to support them, will not be permitted to acquire title to the property of his wife by purchase at a tax sale, but we know of no law to prevent a wife from purchasing, at a public tax sale, the lands of her husband, . . . provided the pur-

chase is made on her own account and with her own money. A wife is under no legal or moral obligation to pay the taxes on her husband's property."

On careful perusal of the record, we think the plaintiffs are entitled to a new trial of the cause, and it is so ordered.

New trial.

W. L. MACE, ADMINISTRATOR, v. CAROLINA MINERAL COMPANY AND SEBE PITMAN.

(Filed 12 May, 1915.)

1. Master and Servant—Negligence—Safe Place to Work—Duty of Servant.

The rule holding the master to accountability in not furnishing his servant a safe place to work does not apply where the servant, an experienced man, necessarily, from the nature of the work, required, in its various stages, to construct the place with reference to his own safety, and his injury proximately results either from his own negligent act in failing to do so or in taking such reasonable and available precaution for his own safety as the dangerous character of his work required.

2. Same—Trials—Evidence—Nonsuit.

In an action to recover damages for the alleged negligent killing of the plaintiff's intestate, the evidence tended to show that the intestate, on account of his experience and knowledge, had been employed by the defendant as foreman in its feldspar and mica mine, having sole charge and direction of those doing the mining; that in directing the work and assisting in digging out a piece of mica, the wall was undermined, causing it to fall on him and kill him. *Held*, a judgment of nonsuit upon the evidence was properly allowed.

APPEAL by plaintiff from *Long, J.*, at November Term, 1914, of MITCHELL.

Action to recover damages for the alleged negligent killing of plaintiff's intestate, Charles Buchanan. He was employed as foreman in defendant's feldspar and mica mine, and was killed by the falling of a bank of overhanging dirt and rock in the mine, which defendant avers was caused by his own negligent act, and not by its fault at all.

The following testimony of plaintiff's witness, Coleman Pitman, who worked with deceased in the mine, will sufficiently explain the character of the evidence in the case: "I was there when the dirt fell in. It was kinder undermined, and there was a block of mica sticking back in there, and we were taking that out, and it just fell over. By undermining I mean digging back under the bank. That had been done all along the tunnel, and then we went after the block of mica as big as your double fist. I was the one that got the dirt from around the mica that evening. The fall occurred about 2 o'clock. . . . Charlie Buchanan ordered us

to get the spar out of there, and we dug in on the underside of the wall, under his orders, to get out the feldspar. We did that that morning and also after dinner. . . . He was digging with us, and getting out the feldspar and telling the hands to do that. We dug in under there, getting feldspar, along until he got to the block of mica. We dug 2½ feet and over back in there. He did not give any order to dig any certain length of feet. He was helping us dig under there, and saw and knew how far under we dug and that we were undermining the wall; he was helping to do it. We dug all along under the wall from the mouth of the cut up to the head of the cut. It was under the wall on the right-hand side we were digging. We discovered the mica along after dinner. We went back to work about 12:30 or 1 o'clock. I discovered the block of mica on the right-hand side of the cut in the wall under which we had all been digging to get feldspar. The block of mica was about 2 feet above the floor of the cut, or perhaps 18 inches; it was straight back into the wall; perhaps 18 inches from the head of the cut. When I discovered it, I told Charlie Buchanan that I had struck a block of mica, and he laughed and said to get it out, and I set to work with my pick and dug after it on both sides. There was a hard substance around this mica. It was about the size of two hands, just in a kind of vein. I worked at it about ten minutes. I do not think I dug in a foot. It is pretty hard stuff. I stripped the mica and dug on all sides of it. I dug half a foot before I stripped the mica. I was working under the orders of Charlie Buchanan, the foreman. Then Charlie Buchanan told Clifton Buchanan to go for the drill, and I went to help Charlie Duncan sort and Clifton. Then Charlie Buchanan took his pick and went to work. He did not say anything about my not knowing how to dig mica. As quick as I stopped, he dug into the wall, and while he was digging the earth fell down on him and killed him. Digging on the underside of that cut removed the support for the dirt that was above it in the cut. Mr. Sebe Pitman came to me after it happened, and asked me the cause of the trouble. I told him Charlie Buchanan was digging in there when it fell. He certainly dug in there and was removing the support for the dirt, and the dirt above there did fall on him. I did not notice how deep he dug in before it fell. I do not remember what position he was in when the dirt fell. I did not see the dirt fall; I looked around after it fell. I was 6 feet from him. It fell out of the place in the wall, starting about 6 feet above, and fell down to where he was digging. No hole left in the wall much for it, just broke off and left a kind of smooth place. I do not know that it was deeper in the center. The hole that was left in the wall was about as deep one place as another, I should think; I really do not know about that. That cut was 15 or 20 feet deep. That morning Charles Buchanan had helped to dig out the feldspar along under the

wall, and told the boys to dig it out. He was digging for mica about where he had been digging for feldspar. The digging in the morning had weakened the wall on the right-hand side, and it was the same wall he had undermined that he was digging the mica out of. The tunnel where it had run in had undermined partly, and kept on going up with it. After I quit digging for mica, Charles Buchanan dug for it between two and five minutes. The digging I did was under his orders. It was my duty to obey his orders. We had worked in that cut all morning. I do not remember where we dug first."

A paper was handed by defendant's counsel to plaintiff's witness M. C. Duncan, it being a written statement by him as to the transaction, and he testified that it was true, as he understood it. It is as follows: "I was employed by the C. M. Co. on 24 April, 1914, and was working under orders of Charlie Buchanan, foreman of Deer Park Mine, No. 3, from whom I received all orders as to what duties to perform. On the morning of 24 April the open cut in which we were working had straight, firm sides, with no overhang. At about 9 o'clock the superintendent visited the mines, and no change of conditions had occurred. About 11:30 o'clock Fule Pitman said to Buchanan that he had struck a block of mica in the side of the cut, and Buchanan told him to go after it. This Pitman did, and afterward Buchanan joined him and commenced undermining the side, and about 2:10 o'clock the overhang fell and buried Buchanan and Clarence Stewart."

There was much evidence introduced by both parties, but the foregoing is the substance of its essential parts. At the close of the evidence the court ordered a nonsuit, and plaintiff appealed.

Charles E. Green, John C. McBee, and J. W. Pless for plaintiff.
Black & Wilson, W. C. Newland, and S. J. Ervin for defendant.

WALKER, J., after stating the case: It appears in this case that the intestate of plaintiff had been employed to work as foreman in the defendant's service, and as overseer of the work performed by others placed under his authority. He was an experienced miner, having been engaged in the business of mining for many years. Because of his expertness thus acquired, the defendant was induced to take him into its service. The work he was to do on the day of the accident was left, in respect to the method and manner of doing it, to his own judgment, and he was perfectly free to exercise his own common sense and skill in doing it. According to the evidence and the description of the conditions in the mine just before he was killed, he did not need any one to tell him that by digging under the projecting or overhanging bank of dirt and rock he was placing himself in a very dangerous position, as the unsupported bank would necessarily cave in when he removed the last prop that kept

it in place. Any man of ordinary sense and common prudence would know of this danger and appreciate the risk of cutting out the foundation upon which a bank of dirt rests and leaving it overhanging, without any support, brace, or prop to prevent its falling in and crushing him, as he was in the way and must needs be hurt. The danger of such a place was so imminent that any ordinarily prudent man would not have so cut underneath the bank as to weaken its support and cause it to fall, or, if this was necessary to be done, would have taken measures to brace it in some way as the work progressed. This Court has often held that "an employer's duty to provide for his employees a reasonably safe place to work does not extend to ordinary conditions arising during the progress of the work when the employee doing his work in his own way can see and understand the dangers and avoid them by the exercise of reasonable care." *Simpson v. R. R.*, 154 N. C., 51. The rule was well stated in *Covington v. Furniture Co.*, 138 N. C., 374, as follows: "The general rule of law is that when the danger is obvious and is of such a nature that it can be appreciated and understood by the servant as well as by the master or by any one else, and when the servant has as good an opportunity as the master or any one else of seeing what the danger is, and is permitted to do his work in his own way and can avoid the danger by the exercise of reasonable care, the servant cannot recover against the master for the injuries received in consequence of the condition of things which constituted the danger. If the servant is injured, it is from his own want of care." *Warwick v. Ginning Co.*, 153 N. C., 262; *House v. R. R.*, 152 N. C., 397; *Hicks v. Mfg. Co.*, 138 N. C., 319. In *Armour v. Hahn*, 111 U. S., 313, it was held that the obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty towards them of keeping a building which they are employed in erecting in a safe condition at every moment of their work, so far as its safety depends upon the due performance of the work by them and their fellows. The case of *Cons. Coal and Mining Co. v. Floyd*, 51 Ohio St., 542, has many facts in common with this one, and they are sufficiently similar in that respect to make it a good authority. There it appeared that the intestate was killed by the fall of slate from the roof of a mine, due to the failure to install props while the work was in progress. The claim for damages was sought to be sustained by a class of cases which hold that the duty of the master to provide a safe working place and machinery for his employees cannot be delegated, so as to absolve the master from liability in case of failure of the vice principal to perform that duty. It does not seem necessary to review these cases. They are, as a rule, based upon the proposition that where the appliance or place is one which has been furnished for the work in which the servants are to be engaged, there the duty above stated attaches to the master. The Court said: "We need

not discuss this proposition, for we have not that case. Here the place was not furnished as in any sense a permanent place of work, but was a place in which surrounding conditions were constantly changing, and instead of being a place furnished by the master for the employees within the spirit of the decisions referred to, was a place the furnishing and preparation of which was, in itself, a part of the work which they were employed to perform. The distinction is shown in a number of cases, among which may be cited: *Fraser v. Lumber Co.,* 45 Minn., 235; *McGinty v. Reservoir Co.,* 155 Mass., 183; *Coal Co. v. Scheller,* 42 Ill. App., 619." And so in *Petaja v. A. I. Mining Co.,* 32 L. R. A. (O. S.), 435, the facts were that the plaintiff was injured by the fall of ore while working in the room of a mine used by the hands while excavating for ore and getting it out. It was decided, and affirmed on a rehearing, that the place where the injury occurred must have been furnished by the master, or be one which his duty to the servant required him to furnish and keep in a safe condition, before the ordinary rule of liability can be applied, and that the place then in question was not of that description. The Court said: "Now, if this room can properly be said to be a place furnished to the servants in which to carry on the master's business and which he must, at his peril, keep in reasonably safe condition, as a factory or warehouse, then the case should have gone to the jury; but if it is not such a place, then it falls within that other rule, that the duty of the master is performed by using reasonable care or furnishing suitable material and employing capable and efficient men to do the work. In view of the case of *Schrolder v. Flint and P. M. R. Co.,* 103 Mich., 213, and *Beasley v. F. W. Wheeler & Co.,* 103 Mich., 196, cited in the former opinion, there is no doubt that a master must furnish a reasonably safe place for a servant to work if a structure is required for the carrying on of his business; and the briefs furnished in this case upon the part of the plaintiff would render us more assistance had they called our attention to cases establishing the claim that a master is obliged to make safe the place which the servant makes and occupies as a means of doing his work or which results as an incident of the work, although it necessitates his presence in a place to a greater or less degree unsafe. In such cases must the master stay with or follow up the servants, to be certain that they make the place safe, so that they or some of them be not injured? There are many cases which draw the distinction pointed out. Such a case is *Beasley v. F. W. Wheeler, supra.*" The same was held to be law in *Fraser v. R. R. Lumber Co.,* 45 Minn., 237, where it was said: "An important consideration often overlooked is, whether the structure, appliance, or instrumentality is one which has been furnished *for* the work in which the servants are to be engaged, or whether the furnishing and preparation of it is itself part of the work which they are required to perform."

It was held in *St. L. and M. R. R. Co. v. Baker,* 163 S. W. Rep., 152, that where a servant was employed to wreck a structure, such as an unsafe building, or to do blasting and excavating, the duty of keeping the place of work safe, if it was originally so, devolves upon the servant, and not on the master. The rule that an employer must exercise ordinary care to provide a safe place of work for his employee was held in *Riley v. Neptune,* 103 N. E. Rep., 406, not to apply where from the nature thereof the conditions are ever changing, so as to increase or diminish the danger in the course of the particular work, the same being passing risks arising out of the nature of the work and of which the servant is as well informed as the master. *L. P. Cement Co. v. Bass,* 103 N. E. R., 483. It was held in *Andrews v. T. Mining Co.,* 146 N. W. Rep., 394, that the doctrine of furnishing a safe place to the servant to do his work does not apply where a miner was killed while engaged in making "hitches" in which to place timbers to hold up the roof, "since he is required to make the piece of work safe as he went." Nor, it has been said, does the rule of a safe place apply to building operations where conditions are continually changing, due to the acts of the servants themselves. *Roshalt v. Worden-Allen Co.,* 144 N. W. Rep., 650. It was not necessary that intestate should have had any warning from the superintendent. He was an expert himself in mining, and it did not even require that one should be so thoroughly experienced in such work as he was to know or understand that the work was dangerous, for a man of ordinary intelligence would know that to withdraw a prop or foundation from an object resting upon it would necessarily cause it to fall.

"1. An employer may ordinarily assume that an adult employee has that knowledge which is acquired by common experience, and hence understands those dangers which may readily be known by common observation.

"2. All adult employees are presumed to have some knowledge of the properties of nature, and the operation of natural laws, such as the law of gravitation.

"3. An employee assumes the risk of injury from obvious dangers, unless because of his immaturity, inexperience, or other disability he is incapable of appreciating the danger therefrom." *Riles v. Neptune,* 103 N. E. (Ind.), 406.

No one should be allowed to justify or excuse his own improper conduct by alleging that he expected that another would prevent such conduct on his part. *Houston, etc., Railroad Co. v. Clemmens,* 55 Texas, 88. Intestate was the author of his own misfortune, and no one was to blame but himself. This is shown with as near an approach to a demonstration as anything short of mathematics will permit, as was said of a plain act of negligence in *B. and P. Railroad Co. v. Jones,* 95 U. S., 439. The same Court, in *Bunt v. S. B. Mining Co.,* 138 U. S., 483,

where an employee had been killed by removing a post which supported the roof of a mine, thus causing the roof to fall upon him, said: "Bunt participated in taking out the post with full knowledge of the danger, and after the post had been removed sat down under the shattered roof. Recklessness could hardly go further. The evidence would warrant no other conclusion than that he took the risks of the work in which he was employed and that his negligence in the course of that work was the direct cause of his death." The two cases are parallel with each other. The fact that there a post was taken out, and here some dirt was dug out, can make no difference. In this case the danger of the place where intestate was working, and the cause of the accident, were due to his own careless act in undermining the upper wall of dirt, so that it lost its natural support and fell upon him. The recent case of *Neville v. Bonsal*, 166 N. C., 218, in which a servant was killed by an act of the foreman similar to the one that caused the intestate's death, is applicable. We held the master liable because the foreman had been negligent in digging at the bottom of an embankment, which caused the upper layer of dirt to fall and kill the intestate of the plaintiff in that case. The Court there said: "The work was being done under the management of one Stowe, who, about three hours before the cave-in, ordered the plaintiff's intestate to work at that place. The evidence shows that Stowe was in and out of the pit all the time, and knew of the conditions. It is a fair inference from the evidence that Stowe took no precautions to prevent a cave-in before the supporting bank of dirt was removed. It was the duty of Stowe to take such precautions as the situation permitted, so as to prevent injury to his subordinates when the bank of dirt at the base of the pit was removed; ordinary prudence dictated it." If the company was held liable because of its foreman's culpable negligence in causing the death of the intestate by improperly excavating the bank of earth, so that its support was weakened and it fell, it follows that the company would not have been liable if the foreman himself had been killed by the same act of negligence, which would, in that case, have been the efficient and proximate cause of the fatal injury. It was even held in *Alteriac v. Coal Co.*, 161 Ala., 435, that "Where a miner of many years experience saw a pot- or bell-shaped rock in the roof of a mine, and knew that it was more or less disconnected and liable to fall without warning at any moment, and after telling his superior of it, and that he would not work without timbers, but who returned to the work under the pot- or bell-shaped rock on being told to do so, and on the promise that the timber would be sent at once, assumed the risk incident to his return and work thereunder." It must be borne in mind that this foreman of hands was himself a very experienced miner, and knew, as the evidence shows, what was the safe method of doing the work. It appears that those of even less experience in mining knew of the danger. If he

had been inexperienced and was put to do work of a dangerous character without proper warning or instruction, the case might be different. He knew of the danger and was fully able to take care of himself, and the fault was all his own. No man, by his own voluntary and negligent act, will be permitted to impose liability on another for its injurious consequences, for he will not be allowed to reap an advantage from his own wrong. *Whitson v. Wrenn,* 134 N. C., 86. The peril was obvious, and he should not have caused it or exposed himself to it.

It follows that there was no wrong committed by defendant which would make it liable for the intestate's death, and the nonsuit was properly granted.

Affirmed.

ELLEN WALKER v. P. R. PARKER.

(Filed 19 May, 1915.)

1. State's Lands—Entry—Vacant and Unappropriated—Former Grant—Statutes.

Land once granted by the State to a citizen does not thereafter become vacant and unappropriated within the meaning of the statute, Revisal, sec. 1893, because the State may thereafter have acquired the land without putting it to a special use.

2. State's Lands—Entry—Descriptions—Statutes.

An enterer on State's lands must file with the entry taker a writing signed by him, giving the location of the lands sought to be entered, nearest water-courses, and remarkable places if any situated thereon, and natural boundaries, if any, of other persons, dividing the lands entered from other lands. (Rev., 1707.)

3. State's Lands—Entry Taker—Publication—Protestant—Statutes.

The entry taker must cause a copy of the entry to be posted and published for thirty days in accordance with the statute, Revisal, sec. 1708, within which time a protest may be filed by one claiming an interest in the lands.

4. Same—Notice to Show Cause—Issues—Parties in Interest.

Upon the filing of a proper protest to the entry, it is the duty of the clerk of the court to issue notice to the enterer upon State's lands to appear at the next term of the court to show cause why his entry shall not be declared inoperative and void (Revisal, sec. 1709); and when this is done, it raises an issue to be heard and determined by the jury.

5. State's Lands—Protestant—Allegations—Descriptions—Interests.

The protestant to an entry of State's lands must allege in his protest that he claims an interest therein, or his protest will be dismissed; and if he claims the lands under a former entry, he must name the grant and describe it with reasonable particularity.

6. State's Lands—Protestant—Allegation—Former Grants—Enterer—Burden of Proof.

Upon allegation, in the protest to an entry of State's lands that a grant thereto had theretofore been issued, the burden is upon the enterer to show to the satisfaction of the jury that the grant does not cover the lands described in his entry, and upon his failure to do so the grant will not issue upon his entry.

7. State's Lands—Former Grant—Entry—Color of Title—Issues.

A grant of State's lands issued for lands previously granted is void for all purposes, and does not constitute color of title, by express provision of the statute, Revisal, sec. 1699, and a protest to the entry raises the issue of title solely between the enterer and protestant, in which the State is not interested.

8. State's Lands—Former Grant—Entry—Protestant—Allegations—Adverse Possession—Limitation of Actions—Burden of Proof.

Where upon protest to the entry of State's lands it is ascertained that the lands described in the entry are not contained in the former grant, the protestant may show, if he can, and upon proper allegation, that the lands are not vacant and unappropriated by sufficient adverse possession to take the title out of the State and vest it in himself.

9. State's Lands—Protestant—Adverse Possession—Limitation of Actions—Burden of Proof.

If the protestant to an entry of State's lands does not allege in his protest that a grant has previously issued for the lands, but that the land is vacant and unappropriated by reason of adverse possession, the burden of proof upon this allegation is upon the protestant.

WALKER, J., concurs in the result.

APPEAL by defendant from *Harding, J.*, at January Term, 1915, of WILKES.

This is a proceeding to protest an entry. The protestant alleged in her protest that she was the owner of two tracts of land, one of 45 acres and the other of 50 acres, the 50-acre tract being, as she alleged, the land covered by the David Parker grant, and that if the land described in the entry was within the boundaries of these two tracts of land, it was not vacant and unappropriated.

The 50-acre tract is located between the 45-acre tract and the land described in the entry, and therefore the land in the entry could not be within the boundaries of the 45-acre tract, and the jury found that the David Parker grant did not cover the land in the entry.

The protestant offered evidence of an adverse possession of the land for thirty years for the purpose of showing title out of the State.

The jury returned the following verdict:

1. Is the land embraced in P. R. Parker's entry as described on the map, or any part thereof, covered by the grant to David Parker from the State of North Carolina, under whom protestant claims? A. "No."

2. Is the plaintiff, Ellen Walker, seized and possessed of said land, or any part thereof, by virtue of open, notorious, continuous, and adverse

possession under known and visible lines and boundaries for a period of twenty years? A. "No."

3. Has the plaintiff, Ellen Walker, or those under whom she claims, been in the adverse possession of the land referred to as the P. R. Parker entry in this case for thirty years, such possession being ascertained and identified under known and visible lines or boundaries? A. "Yes."

4. Is the land described in the entry and survey of plaintiff's contentions vacant and unappropriated? A. "No."

The charge of his Honor indicates that the second issue has not been properly transcribed and that the question really presented in that issue was whether the protestant had been in adverse possession of the land for twenty-one years under color.

His Honor charged the jury that the burden was upon the enterer upon the third issue to satisfy the jury that the protestant had not been in the adverse possession of the land described in the entry for thirty years, and the enterer excepted.

There was a judgment in favor of the protestant, and the enterer appealed.

H. C. Caviness for plaintiff.
Hayes & Jones, Finley & Hendren for defendant.

ALLEN, J. "All vacant and unappropriated lands belonging to the State," subject to certain exceptions which are not involved in this appeal, are the subject of entry (Revisal, 1693), and it has been held that "Lands that have been once granted by the State to individual citizens, that is, cut off from the undefined public domain and appropriated to private uses, do not become vacant within the meaning of the statute simply because the State may in some way again acquire them, and fail to put them to any special use." *S. v. Beavers,* 86 N. C., 590.

The person who claims the right to make the entry is required to file with the entry taker a writing signed by him, setting forth where the land is situate, the nearest water-courses and remarkable places that may be thereon, and the natural boundaries of any other person, if any, which divide the land entered from other lands (Revisal, 1707); and the entry taker is, among other things, required to cause a copy of the entry to be posted for thirty days at three public places in the township or townships in which the land covered by the entry is located and at the courthouse door, and also to advertise the same for thirty days in a newspaper, if there is one in the county. (Revisal, 1708.)

The purpose of this notice is to give information to the public, and any person who claims title or interest in the land covered by the entry has the right within the time provided for the publication of the notice and the advertisement, and not thereafter, to file his protest (*Garrison*

v. Williams, 150 N. C., 677), which should contain a denial that the land is vacant and unappropriated land belonging to the State, and allegations as to his claim or interest therein.

The right to protest is not given to intermeddlers, but only to those who claim title to or interest in the land (*Lumber Co. v. Clark,* 152 N. C., 546), and the protestant is therefore required to assert his title or interest.

When the protest is filed it is then the duty of the clerk of the Superior Court to issue notice to the claimant to appear at the next term of the Superior Court to show cause why his entry shall not be declared inoperative and void (Revisal, 1709), and the issue joined is then to be heard and passed upon by a jury.

The State has no interest in this issue, because "it is immaterial to which one of her citizens she grants a particular tract of land; from each she gets the same revenue from it when granted" (*O'Kelly v. Clayton,* 19 N. C., 248), and since the act of 1893, now section 1699 of the Revisal, a grant issuing for land previously granted can work no injury to the State or to any citizen, as it is expressly provided by that act that such grants are "void for all purposes" and "shall under no circumstances constitute any color of title whatsoever to any person whomsoever."

It has, therefore, been held that as the enterer has no right to enter land unless it is vacant and unappropriated land belonging to the State, that the burden is upon him to prove that the land is subject to entry, but that this burden of proof is only as against the protestant. *Walker v. Carpenter,* 144 N. C., 647; *Bowser v. Wescott,* 145 N. C., 56; *Cain v. Downing,* 161 N. C., 598.

The case of *Bowser v. Wescott, supra,* states more fully than either of the others the grounds upon which the ruling of the Court proceeds, which is, that since the act of 1885, requiring the registration of deeds, the enterer has access to the title of the protestant, and as he is asserting as against the protestant that the land is vacant and unappropriated, he should assume the burden of examining and locating the grant which the protestant claims covers the land and of proving that the land he proposes to enter is not within its boundaries.

These cases, thus understood, impose no burden upon the enterer which he ought not to assume, and if the burden is sustained and the fact is established that the grant does not cover the land, the presumption then arises, as the State has issued no grant, that the title is in the State, and nothing else appearing, the enterer is entitled to his grant; but if the protestant wishes to contest the right of the enterer further, upon the ground that the title of the State has been lost by adverse possession, he must rebut the presumption, and the burden of the evidence shifts to him to furnish evidence of adverse possession.

If the grant issues, no harm comes to the protestant if he has a just claim, as the proceeding upon the protest is not one to try title (*Lumber Co. v. Coffey,* 144 N. C., 560), and in an action to recover the land after the grant issues, he may prove that the State had lost the title by adverse possession at the time the grant issued (*Lovingood v. Burgen,* 44 N. C., 408), unless issues have been joined and a judgment rendered, which might work an estoppel.

This presumption that title is in the State when no grant is shown is applied in contests between individual citizens for the recovery of land when the State is claiming no interest therein, and it would seem that the reason for the application of the principle would be stronger in a proceeding like this when it is shown that the State has issued no grant covering the land described in the entry, and when the protestant is claiming by adverse possession, and not because he has paid anything to the State for the land, and when the enterer proposes to pay what the State asks for it.

The case before us goes a bowshot beyond any of those heretofore considered by this Court, as it appears that although the protestant sets out in her protest by metes and bounds the two tracts of land which she claims to own, a 45-acre tract and a 50-acre tract, and says that the land is not subject to entry if within the boundaries of these two tracts, and although the jury has found that the land within the entry is not within the boundaries of the protestant's grant, she is permitted to offer evidence of adverse possession, although title by possession is not alleged in the protest as to the land proposed to be entered, and the burden is cast upon the enterer under the charge of his Honor to prove that the protestant has not been in adverse possession of the land for thirty years.

This ruling leads to the conclusion reached by his Honor, and which is embodied in his charge to the jury, that if the enterer failed to satisfy the jury that the protestant had not been in the adverse possession of the land for thirty years, they would answer the third issue "Yes," that is, if the protestant had not been in possession for thirty years the jury should find that she had been in possession for that length of time.

It was competent for the protestant to allege in her protest that the land was not vacant and unappropriated by reason of an adverse possession for thirty years, and to offer evidence in support of the allegation; but to impose the burden of proving the negative of this issue upon the enterer is in most cases to require an impossibility.

Possession and use of land is evidence of an adverse possession, but it is not adverse if not under a claim of right, and no one knows so well as the claimant whether the possession has been as of right or permissive.

Again, there is no reason why the enterer should be observant of the condition and possession of the land prior to the time of taking out his entry, and he would not be in possession of the facts as to possession,

while the protestant would have full knowledge and could give information in detail as to the extent and length of possession.

The general rule as to the burden of proof is that the burden is upon him who alleges the affirmative (*Millsaps v. McCormich,* 71 N. C., 53; *Edmonston v. Shelton,* 46 N. C., 451), and that when a fact is peculiarly within the knowledge of a party, or the evidence is more available to him, or he has better means of knowledge concerning the fact to be established than the other party, he must assume the burden of proof. *Cook v. Guirken,* 119 N. C., 17.

The protestant, when he claims by adverse possession, alleges the affirmative of the issue, in that he says there has been an adverse possession of the land for thirty years, and the evidence to sustain this allegation is peculiarly within his own knowledge, and the ruling of his Honor, therefore, contravenes the rules usually applied as to the burden of proof, and also substantially destroys the presumption that title is in the State, unless it is shown that a grant has issued.

We therefore conclude that the correct rules upon the trial of a protest to an entry are:

1. The protestant shall be required to state in his protest that he claims an interest in or title to the land covered by the entry; and if he fails to do so, his protest shall be dismissed.

2. If he claims that a grant has issued for the land covered by the entry, he shall name the grant, and describe it with as much particularity as he can.

3. When the protestant alleges that the State has issued a grant covering the entry, the burden is on the enterer to prove to the satisfaction of the jury that the grant does not cover the land described in the entry; and if he fails to do so, no grant can issue upon his entry.

4. If the enterer establishes the fact that the grant described in the protest does not cover the land described in the entry, the protestant may, if he has so alleged in his protest, and not otherwise, prove that the land in the entry is not vacant and unappropriated land by reason of adverse possession, and that the burden of so proving is upon him.

5. If the protestant does not allege in his protest that a grant has issued for the land, but that the land is vacant and unappropriated by reason of an adverse possession, the burden of proof upon this allegation is upon the protestant.

We are, therefore, of opinion that the charge of his Honor as to the burden of proof was erroneous, and a new trial is ordered.

New trial.

WALKER, J., concurs in result.

RALEIGH, CHARLOTTE AND SOUTHERN RAILWAY COMPANY v. MECKLENBURG MANUFACTURING COMPANY.

(Filed 24 May, 1915.)

1. Railroads—Condemnation—Measure of Damages—Diminished Value.

Compensation to the owner of lands acquired by a railroad company in condemnation proceedings is required by law, and includes indirect injuries to the land as well as those of a physical kind which will directly diminish its value, and which are capable of legal proof, and do not rest upon mere conjecture, speculation, or surmise.

2. Same—Adaptation of Property—Prospective Use.

The compensation to be awarded the owner of lands for a right of way acquired thereon by a railroad company under condemnation proceedings must be full satisfaction for the diminution in value of the property as a whole, considering the purposes for which it was used, and is not confined to the value of the property in its present state and condition, but should be extended so as to include its adaptation for future uses, and the depreciation of the whole resulting from the use of a part for railroad purposes.

3. Railroads—Condemnation—Measure of Damages—Cotton Mills Settlement—Damages to Plant—Employees—Incidental Use.

Where a railroad company has condemned a right of way over lands used for a cotton mill plant and settlement, it is competent to prove, in showing the consequent depreciation of the value of the whole property, that it had been appreciably affected to its detriment by noises, smoke, cinders, jarring, discomfort, inconveniences, and other like causes incident to the running of the trains on the right of way, and by the risks and dangers of fire and injury to employees and their children; and that the use of the right of way, because of such things, would disorganize its help and tend to drive its operatives away, by rendering their condition uncomfortable, if not intolerable, requiring the substitution of cheaper and inferior labor, thus lowering the standard quality of the output of the mills; but the proof should be confined to the general facts, excluding such particulars as the number of hands the changed conditions would cause to leave, and an estimate of depreciation in value, based upon a capitalization of the pay rolls which will be increased by the evil effects of the right of way and the trains upon the employees and their families.

4. Evidence—Witnesses—Experience—Knowledge—Experts.

Upon the question of the amount of damage to a cotton mill plant and settlement caused by the acquisition and use of a railroad right of way on the lands, it is competent to show by witnesses, having actual knowledge of the lands and its improvements, the situation, uses, and surroundings of the same, and also their opinions based thereon, and upon their long observation and experience in the same kind of business which is conducted on the premises in question.

5. Railroads — Condemnation — Measure of Damages — Common Damages — Special Use.

The rule that damages common to all persons along the line of an acquired right of way are not recoverable by the owner in condemnation proceedings does not apply when the land is taken and appropriated to a use which directly impairs its value by reason of the smoke, jarring, danger, etc., because of its peculiar nature or particular enjoyment, though not necessarily in a direct physical way.

6. Railroads—Measure of Damages—Evidence.

Upon the question of compensation to be paid the owner of lands for a right of way acquired under condemnation proceedings, it is competent to show the value of the lands, with their improvements, or of the entire plant, before and after the taking, as tending to show the depreciation caused thereby.

7. Trials—Witnesses—Explanations—Incompetent Evidence—Procedure.

Questions on cross-examination of a witness for the purpose of testing the value of his testimony may be proper when incompetent on direct examination, and it is permissible for the witness to give his reason when confined within proper limits; and an improper reason will not necessarily render the opinion of the witness incompetent, for there may be other valid reasons, and where the reason is deemed to be incompetent, the objecting party should expressly object to it or ask that it be stricken out.

8. Appeal and Error—Evidence—Competent in Part—Objections and Exceptions.

Where objection is made that the answers of witnesses have taken too broad a range, and some of the testimony is competent, the objection should be made to the incompetent matter, specifying it, and not to the answer as a whole.

APPEAL by both parties from *Harding, J.*, at November Term, 1913, of MECKLENBURG.

This is a petition to rehear the former decision in the above entitled case, which is reported in 166 N. C., 168. The petition was filed by the defendant and relates only to the plaintiff's appeal, in which a new trial was given for reasons stated in the opinion of the Court. The proceedings were brought for the condemnation of a right of way over the defendant's lands, upon which it had erected a mill for the manufacture of cotton goods, with its buildings for employees and other appurtenances. The contentions of the parties upon the issue as to damages are thus stated in the opinion of this Court:

"The plaintiff's exceptions are numerous, but all refer to the evidence and the charge on the measure of damages.

"The plaintiff contends that the defendant was entitled as compensation to the value of the land embraced in the right of way, plus any direct actual damages to any part of the remaining land.

"The defendant contends that the compensation to which it is entitled is the difference in the value of its entire manufacturing plant and premises, embracing 20 acres, before the right of way was condemned and afterwards, and that this difference in value is to be estimated by taking into consideration that the operation of a steam railroad would inconvenience and annoy the operatives by the noise, smoke, and inconvenience produced by the trains operating in proximity to their houses; that the dangers and perils to the operatives in going to and from their work would be increased by having to cross said railroad track; that the lives and limbs of the children of the mill operatives will be imperiled

by their crossing said track in going to school and while playing near by; that their parents would be in constant fear, while at work in the mill, lest the children should be run over by the passing trains, and that on account of these conditions the better class of operatives will be driven away and the defendant will be able to secure in their places only inferior help at increased wages, with result of decrease in the quantity and quality of the mill output and an increase in the cost of production, thereby materially depreciating the market value of the property as a cotton manufacturing plant."

This Court held: "The right of eminent domain is granted because the public interest requires that private property shall be taken for public use under the circumstances and in the manner prescribed by law. The owner is entitled as compensation to the actual and direct damages which he may sustain by being deprived of his property. These damages are limited to those which embrace the actual value of the property taken and the direct physical injuries to the remaining property." Referring to the contentions of the defendant as to the considerations, and the facts, which should enter into the assessment of damages, as above set forth, the Court said: "The jury were allowed to consider these as grounds of damages, and also to introduce as experts cotton manufacturers to give their opinion as to the effect upon the value of this mill property by the laying out of the plaintiff's right of way. These experts estimated that the difference on the pay roll from the above causes would be $4,000 to $5,000 per year, which they capitalized at $60,000 to $80,000, and expressed their 'expert opinion' that the plaintiff should pay the defendant this sum of money as damages for the right of way 100 feet wide, of which only some 20 feet probably is actually occupied by the railroad, and a little over 300 yards long." The Court rejected this evidence, which the lower court allowed to be heard, upon the ground that it was conjectural and speculative, and did not fall within the rule laid down, that the defendant was entitled to recover as compensation the actual and direct damages which it may sustain by being deprived of its property, which are limited to those that embrace the actual value of the property taken and the direct physical injury to the remaining property. The defendant asks that we rehear and reverse that decision, upon the following grounds and because of the errors therein, which are assigned in the certificate of counsel, by which we are restricted, as follows:

"1. The Court erred in holding that only evidence of actual physical injury to the land not taken could be considered.

"2. The Court erred in holding that in ascertaining the depreciation in the market value of the land the defendant was not entitled to have the whole plant considered and valued.

"3. The Court erred in holding that the defendant was not entitled to show depreciation in the market value of the land on account of dangers, inconveniences, and annoyances to its mill operatives and their children as the result of the running of trains at grade through the mill village over the plaintiff's right of way.

"4. The Court erred in holding that it was not competent for the defendant to show that the operating of trains over the right of way through the mill village would disorganize help, increase wages, and decrease production of the defendant's manufacturing plant.

"5. The Court erred in holding that the dangers, inconveniences, and annoyances suffered by the defendant, as the result of the operation of trains over the right of way in question, were common to all property owners alike.

"6. The Court erred in holding that the opinion of experienced cotton manufacturers were incompetent to show the depreciation in the market value of the defendant's plant, on account of the dangers, annoyances, and inconveniences resulting from the operation of trains through its mill village.

"7. The Court erred in declaring that the jury were allowed to consider as grounds of damages the estimates of mill 'experts' as to the increased pay roll of the defendant, capitalized at from $60,000 to $80,000.

"8. The Court erred in stating that there was no evidence tending to show that the defendant had lost even one of its operatives by reason of the location of the plaintiff's tracks, or had been forced to pay higher prices to its operatives, or hire inferior help for that cause."

Under each assignment of error, and as a part thereof, the particular part of the opinion of this Court to which it is addressed is set out, for the purpose of showing the ruling of this Court alleged to be erroneous. It is not necessary to repeat them here, as they can readily be found in the opinion. The foregoing statement will be sufficient for a clear understanding of the questions raised on this rehearing.

Tillett & Guthrie for plaintiff.
Cansler & Cansler and J. W. Keerans for defendant.

WALKER, J., after stating the case: In this case both parties appealed to this Court from the judgment below, the defendant upon the ground that the land was not subject to condemnation under our statute which exempts certain property from the operation of the law. This view was rejected by the Court, the writer of this opinion dissenting. The plaintiff's contention that there were errors in the rulings and charge of the court below was sustained and a new trial ordered.

The first five errors, in our former decision, now assigned, may naturally be considered together, as if we were wrong in holding that only the

value of the land actually taken, and the direct physical injury to that which was left, can be considered, there was error, and the other assignments relate only to the extent of the error. We are satisfied, upon reconsideration of the case, that the rule thus stated by the Court was entirely too narrow and restricted, and if applied without modification, or, at least, full explanation, will not afford just compensation to those whose lands may be appropriated for a public use; but we do not think this requires that the former conclusion or judgment of this Court should be reversed, for reasons to be hereinafter stated.

It may be said, generally, that there are some, if not many, indirect injuries to land, not necessarily of a physical kind, which will diminish its value, and which are susceptible of the kind of proof which the law requires in cases generally. It may, in the beginning, be readily and fully conceded that mere conjecture, speculation, or surmise is not allowed by the law to be a basis of proof in respect of damages or compensation. The testimony offered should tend to prove the fact in question with reasonable certainty. *Byrd v. Express Co.*, 139 N. C., 273; *Machine Co. v. Tobacco Co.*, 141 N. C., 284. There are expressions in the case of *R. R. v. Wicker*, 74 N. C., 220, which give some support to the ruling in this case; but the principles stated in that case have been greatly modified by subsequent decisions of this Court, and we have been brought more in line and into more perfect agreement with the prevailing thought upon this subject, as exhibited in the many decisions of other courts. We are not permitted to apply the same rule in a case of this sort as obtains with reference to one where there has been no condemnation or taking of land for a public use, and where the injury complained of may be no more than a mere inconvenience or annoyance to an adjacent proprietor which is common to all others similarly situated. We hold our property subject to all necessary or reasonable police regulations, and private inconvenience must give way to the public good; but it is quite a different thing when the property of the individual is taken or condemned for public use, for in such a case the positive law requires, as well as justice and equity, that we should make fair and reasonable compensation.

The case of *Austin v. R. R.*, 108 Ga., 671, was relied on in the former opinion to sustain the doctrine that the injury to the part of the land not taken must be direct and physical; but that was not a case of condemnation, where the land was taken for a public use, nor was there any invasion of property or physical interference therewith. The Court held that the right to recover damages or compensation for injury or inconvenience resulting from noise of the passing trains, smoke, jarring or vibration, or any other annoyance, was incident to the taking of the property or some invasion of it, or obstruction of some right or easement connected with or appurtenant to it, and that the inconvenience or annoyance alone

will not furnish an independent ground for the assessment of damages; and this was so, said the Court, because the right to "compensation" is given only where there has been a "taking" of private property. When such is the case, not only the direct but the incidental injury resulting in a diminution of its value may be considered in making compensation. This Court more recently has considered the *Austin case* in *R. R. v. Armfield,* 167 N. C., 464, where it was said: "The rule for awarding damages in condemnation proceedings was not involved in the decision, and, on this question, *Simmons, C. J.,* delivering the opinion, said: 'In such a proceeding the effect of smoke and noise in the operation of trains are properly to be considered in so far as they tend to impair the value of the property'; and, referring to and distinguishing a former decision of the Georgia Court, he further said: 'In our own case of *Steiner v. R. R.,* 44 Ga., 546, the tracks were in the street, immediately in front of plaintiff's residence, physically invading his right of way and thereby giving him a cause of action. When there has been this physical interference, there is a "damage" in connection with the taking of private property, consisting of an easement of right of way, and the plaintiff, being thus damaged, is allowed to show all the elements of damages. The effect of smoke and noise is considered, not as an independent element of damage, but as tending to prove the value after the railroad has taken or damaged property or some right appurtenant.' " The case, therefore, instead of being an authority for excluding annoyance from noise, smoke, vibration, etc., as matters affecting the value of the property, and therefore as proper to be considered in estimating the damage, is strongly the other way, so far as a case where the very point was not involved can be an authority. This Court, on the authority of the Georgia case and many others, deliberately concluded, in the *Armfield case,* that such proof as was offered by the appellee, in regard to noises, smoke, etc., was admissible to show diminution in the value of the land as a basis for the award of compensation. It is there said: "In these and all other cases where this question of condemning a right of way is substantially presented the principle as stated is only intended to exclude considerations of sentiment or personal annoyance, detached from any effect on the pecuniary value of the property or the allowance of damages purely of a speculative character; and accordingly it is held here and in well considered cases elsewhere that in awarding damages for a railroad right of way plaintiff shall be allowed to recover the market value of the property actually included, and for the impairment of value done to the remainder, and that in ascertaining the amount it is proper, among other things, to consider the inconvenience and annoyances likely to arise, in the orderly exercise of the easement, which interfere with the use and proper enjoyment of the property by the owner, and which sensibly im-

pair its value, and in this may be included the injury and annoyance from the jarring, noise, smoke, cinders, etc., from the operating of trains and also damage from fires to the extent that it exists from close proximity of the property, and is not attributable to defendant's negligence," citing *R. R. v. McLean,* 158 N. C., 498; *Brown v. Power Co.,* 140 N. C., 333; *Chicago v. Taylor,* 125 U. S., 161; *R. R. v. Hall,* 78 Texas, 169 (9 L. R. A., 209); *Tel. Co. v. Darst,* 192 Ill., 47 (85 Am. Rep., 288); Lewis on Em. Dom. (3 Ed.), sec. 706 (478); 2 Elliott on Railroads, sec. 978; 15 Cyc., p. 724.

We may pause here to state that we need not decide whether risk from fires likely to be caused by negligence may be considerd in the general estimate, for there is no such question presented by the exceptions, as there was no special instruction given in regard thereto.

We do not perceive why the case of *R. R. v. Church,* 104 N. C., 529, is not an authority for the position that the proof is not confined to direct physical damage to the property, but may include annoyance or inconvenience to those occupying the premises or the buildings thereon, provided the jury find that the value of the property is diminished thereby. There is no substantial difference between the two cases. We will refer to that case a little more fully, as it seems to be a direct and valuable authority as to several of the questions presented in this record. It points out the marked difference between showing a diminution in value of the property, on account of the several annoyances from passing trains, and proving them for the purpose of recovering special damages for the annoyance itself, as a distinct element of damage. The one is proper, and the other is not. The interruption or disturbance of religious services held in the church, by reason of the noise and other causes incident to the running of trains, and the frightening of horses of the worshippers from the same causes, was held to be proper for the consideration of the jury in determining how, if at all, the value of the property as a site for the church had been thereby affected, and not as, in themselves, separate items of damage. We do not see why the case is not parallel with this one. If it is competent to prove those things, as tending to show a diminution in value of the particular land for church purposes, why not apply the same rule to similar annoyances as tending to show a decrease in the value of land for mill purposes? The result is apt to be the same in the one case as in the other, though not, perhaps, of the same degree. The two cases are, at least, sufficiently analogous to make *R. R. v. Church* an authority for the position we have taken. The risk or danger of the property being damaged or destroyed by fire set out by passing trains is another matter which is proper to be taken into account for the purpose of showing how the property has been lessened in value by the location of the right of way on the land, and the word "property" must be taken as including the entire plant, or the land

enhanced in value by the mill, other structures and other improvements placed upon it, and the difference in value is the measure of compensation. These views are strongly supported by many authorities in other jurisdictions. Pierce on Railroads, pp. 210, 211; *Baker v. R. R.,* 236 Pa., 483; *R. R. v. Williams,* 133 Ga., 679; *R. R. v. Nix,* 137 Ill., 141; *Kayser v. R. R.,* 88 Neb., 343; *Moore v. R. R.,* 130 N. Y., 523; *R. R. v. Kirkover,* 68 N. E. (N. Y.), 366; *Summerville v. R. R.,* 22 N. J. Law, 495; *R. R. v. Board of Education,* 32 Utah, 305; *Duke of Buccleuch v. Boards of Works,* L. R. 5, H. L. 418; *Comstock v. R. R.,* 169 Pa., 287; *Summerville v. Doughty,* 22 N. J. L., 495; *R. R. v. Coly,* 73 Wash., 291; *Gas Transp. Co. v. Cartee,* 149 Ky., 90; *R. R. v. Bluchle,* 234 Mo., 471; *Power Co. v. Broneau,* 41 Utah, 4; *R. R. v. White Villa Club,* 155 Ky., 453; *R. R. v. Munsell,* 38 Okla., 253.

The above cases fairly and fully illustrate the prevailing doctrine of the courts and the utmost extreme, in some instances, far beyond those here proposed, to which it has been carried. Instructive cases as to special features of the subject will be found in *R. R. v. Mendosa,* 193 Mo., 518, as to risk from fires affecting the value without regard to probability of fire even by negligence: *Kayser v. R. R., supra,* as to noise, smoke, and other annoyances; *R. R. v. Board of Education, supra,* as to danger of railroad tracks and other hazards and inconveniences, as affecting public school grounds; *R. R. v. Bass,* 9 Ga. App., 83, as to inability to hear over a telephone, prevalence of smoke, dust, and other like facts. The Court said, in *Snyder v. R. R.,* 25 Wis., 60: "There is a very wide distinction between giving damages for such remote and possible injuries and compensating the owner for the actual *depreciation* of his property because of its *exposure* to such hazards and dangers. Whatever may cause the depreciation, the loss to the owner is the same. If in consequence of its exposure to these remote injuries the property is diminished one-half in value, then this decrease in value measures the actual loss to the owner." And in *R. R. v. Hill,* 56 Pa. St., 460: "We do not see much difference, in the nature and certainty of the exclusion of the customers of this mill, between an absolute physical obstruction, directly in their way, and others which continually threaten their lives and limbs in the use of the ordinary means of getting there." This question was carefully discussed in *R. R. v. Cont. Brick Co.,* 198 Mo., 698, with special reference to the exposure of property to fire by the location of the right of way and its proximity to buildings and other inflammable material. The Court said: "A prudent business man would generally prefer to purchase property in which to conduct his business which is not peculiarly liable to destruction by fire, even though the menacing party may be solvent and liable to responsibility in damages." 10 A. and E. Enc. (2 Ed.), pp. 1117 and 1118, and notes 1 and 2, and cases cited. It all comes to this at last, that the landowner is entitled

"to full and complete compensation, and it must include everything which affects the value of that which is taken in its relation to the entire property," as said in *Abernathy v. R. R.*, 150 N. C., 97. The Court also said, in *Brown v. Power Co.*, 140 N. C., 333: "Certainly where, by compulsory process and for the public good, the State invades and takes the property of its citizens in the exercise of its high prerogative in respect to property, it should pay to him *full compensation.* The best authorities are to that effect. . . . The State has conferred upon the company, to enable it to accomplish these beneficent results, one of the highest and most dangerous of its sovereign powers, that of eminent domain. An essential and elementary condition precedent annexed to the exercise of this power is that the owner of property, who is compelled to surrender it, shall have full compensation." It was stated in *U. S. v. Grizzard,* 219 U. S., 180 (5 L. Ed., at 166, 167), that the rule of compensation requires that the landowner should be paid for the part actually taken for the right of way, and in addition thereto justice demands that he also be remunerated for the further loss incurred in the depreciation of what remains of the land which results from such taking, and also in its future use and value, and this loss is not confined to direct physical injury, but the injury should extend to all incidental injuries to the part not taken which are caused by the location of the right of way, and which tend to reduce its value. The Court then says: "To say that such an owner would be compensated by paying him only for the narrow strip actually appropriated and leaving out of consideration the depreciation to the remaining land by the manner in which the part was taken *and the use to which it was put* would be a travesty on justice." In order to arrive at this full compensation, the jury must consider the land with its improvements as a whole and the effect thereon of the appropriation of a part for a right of way, with reference, of course, to any loss in value by reason of such taking and the uses to which the land so taken is to be applied. We so held in *R. R. v. Armfield, supra; Brown v. Power Co., supra; R. R. v. Church, supra,* and the principle is sustained by numerous decisions in other courts. *R. R. v. Hill,* 56 Pa. St., 460; *R. R. v. Cont. Brick Co.*, 198 Mo., 698; *Foust v. R. R.*, 212 Pa. St., 215; *Rouck v. Cedar Falls,* 134 Iowa, 563; *R. R. v. Roeder,* 30 Wash., 247; *R. R. v. L. A. Synod,* 20 Idaho, 573; *Brainerd v. State,* 131 N. Y. Suppl., 221; *R. R. v. Chamberlain,* 100 Va., 402; *Pause v. Atlanta,* 98 Ga., 95; *Jeffreys v. Osborne,* 145 Wis., 351; *R. R. v. Memphis,* 126 Tenn., 275; *R. R. v. White Villa Club,* 155 Ky., 453; *Nelson v. Atlanta,* 138 Ga., 347; *R. R. v. Gordon,* 184 Ill., 456. As we have shown, we held in *Abernathy v. R. R., supra,* that the compensation must be full and complete and include everything which affects the value of the property taken and its relation to the entire property affected. Speaking of the method of ascertaining the value and the depreciation, the Court said

in *Brainerd v. State, supra:* "It is a matter that must be left to the judgment of the court, but it may be safely asserted that no element should be excluded in arriving at the market value of the premises which it is customary for the business world to consider in determining such market value, or which an ordinarily prudent man would take into account before forming a judgment as to the market value of the property which he is about to purchase." And in *R. R. v. Hill,* 56 Pa. St., 460, the Court thus referred to the same subject: "We regard the testimony as but a mode of ascertaining the measure of damages, sanctioned by the authorities, viz., the difference between the value of the property after the construction of the railroad and before; the amount of depreciation when ascertained by proper tests being the amount the owner should be entitled to." But the jury, in fixing the value and estimating the loss, are not confined solely to a consideration of the property in its present state and condition, but may go further and take into consideration the uses to which it may be adapted in the future, and predicating the value upon this also, they will determine what depreciation has resulted by the taking and use of a part of the property. Mills on Em. Domain, sec. 173. We said in *R. R. v. Armfield, supra,* quoting in part from Pierce on Railroads, p. 217: "In estimating the value, all the capabilities of the property and all the uses to which it may be applied or for which it is adapted are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner. Speaking to this same question, Pierce on Railroads, p. 217, states that the author (Lewis on Eminent Domain) says: 'The particular use to which the land is applied at the time of the taking is not the test of its value, but its availability for any valuable or beneficial uses to which it would likely be put by men of ordinary prudence should be taken into account. It has been well said that the compensation is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may reasonably be expected in the immediate future. But merely possible or imaginary uses, or the speculative schemes of its proprietor, are to be excluded.'" In this connection we may well refer to what is said in the following cases: "A citizen must surrender his private property in obedience to the necessities of a growing and progressive State, but in doing so he is entitled to be paid full, fair, and ample compensation, to be reduced only by such benefits as are special and peculiar to his land." *R. R. v. Platt Land,* 133 N. C., 266. "It need hardly be said that nothing can be fairly termed compensation which does not put the party injured in as good condition as he would have been if the injury had not occurred. Nothing short of this is adequate compensation." *R. R. v. Heisel,* 47 Mich., 378. Where, in the nature of things, there can be no market value of a piece of land, as separated from an extensive business enterprise in con-

nection with which it is used, its value cannot justly be determined without considering the use to which it has been applied. "The value of the land consists in its fitness for use, present and future; and before it can be taken for public use the owner must have just compensation. If he has adopted a peculiar mode of using that land by which he derives profit, and he is to be deprived of that use, justice requires he should be compensated for the loss. That loss is the loss to himself. It is the value which he has, and of which he is deprived, which must be made good by compensation." *R. R. v. Memphis, supra.*

We are of the opinion that those called "experts" in this case were competent to give their opinion as to the value of the land or plant and its depreciation by the location of the right of way and the uses to which it was afterwards put by the plaintiff. They were not testifying, it appears, strictly as experts, but with actual knowledge of the land and its improvements, its situation, uses and surroundings, and their several opinions were based upon such knowledge, aided by their long observation and experience in the same kind of business which is carried on by defendant on the premises in question. It would seem that the competency of such evidence was expressly decided in *R. R. v. Church, supra*, by this Court. But there are other cases equally as strong in support of its competency. *Davenport v. R. R.*, 148 N. C., 287; *Sykes v. Payne*, 32 N. C., 280; *Wade v. Telephone Co.*, 147 N. C., 222; *Cotton Mills v. Assurance Corporation*, 161 N. C., 562, where the Court said, at p. 564: "The court erred in refusing to permit the witness Taylor, who had twenty years experience in the cotton mill business, to state whether work of this character was the repair of or an addition to the mill plant. The evidence offered was not a mere matter of opinion, but the result of knowledge and observation by the witness. *Davenport v. R. R.*, 148 N. C., 287; *Ives v. Lumber Co.*, 147 N. C., 306; *Morrisett v. Cotton Mills*, 151 N. C., 33. It is true, the jury, upon all the evidence, could have drawn their own conclusion on this point. But the evidence of Taylor, if it had been admitted, would have been only a matter for consideration by them, and not conclusive." As held in *R. R. v. Cont. Brick Co., supra*, the knowledge and experience of such witnesses, acquired while engaged in the same kind of business, adds weight and trustworthiness to their opinions, and theirs is exactly the kind of knowledge that is needed in order to obtain an intelligent estimate of that "just compensation" called for in a case of this kind. See, also, *Jeffreys v. Osborne*, 145 Wis., 351; *R. R. v. Columbia, etc., Synod*, 20 Idaho, 573; *R. R. v. Hill, supra.*

But it is suggested that these supposed elements of damage are common to all persons along the line of railway whose property is similarly circumstanced, that is, there is the same exposure to fire, smoke, noise, dangers, and hazards to persons, as well as property. In the first place,

there is no evidence that there is any plant, the same as this one or bearing any resemblance to it, on the line of this railway, or, if there is, that it is affected in the same way; but apart from this consideration, the dangers, hazards, inconveniences and annoyances, etc., are not, in such a case as this, to be regarded as in any just or legal sense common to other landowners, and that doctrine should not apply when land is taken and appropriated to a use, as here, which directly injures or damages the property, because of its peculiar nature, though not necessarily in a physical way. As we have already shown, this question is virtually settled by the decision in *R. R. v. Armfield,* at last term, 167 N. C., 464, where it was said that those uses of the easement acquired by the railroad company which are likely to interfere with the proper enjoyment of the land by its owner, and which sensibly impair its value, should be considered by the jury, and these include jarring, noise, smoke, cinders, and other annoyances of a similar kind arising from the operation of trains, and risks from fires caused by close proximity to the track. The physical injury or damage to the land not taken would, in a certain sense, be common to all land through which the road would pass, but being a special and distinct injury to this land, it does not, for that reason, destroy or even affect the right to compensation, which is inseparably incident to the right of appropriation to the particular public use. *R. R. v. Bluchle,* 234 Mo., 471, and cases *supra.* The law says: "You may have the land or any easement therein which is reasonably necessary for your purpose, but you must compensate the owner, justly and fully, for it and for any damage accruing to the remainder of his property by reason of the use to which you may put it, and because of its injurious effects upon the property." The damage to the property remaining is considered as much a taking as is the actual appropriation of the part condemned for the right of way, and the cases above cited sustain this view.

It was competent to prove the value of the land, with its improvements, or the entire plant, before and after the taking, as tending to show the depreciation and the amount of compensation. *R. R. v. Church, supra; Brown v. Power Co., supra,* and *Jeffreys v. Osborne,* 145 Wis., 351. In the *Church case* (104 N. C., at p. 529) this Court said: "Unquestionably it was competent to show what the land was reasonably worth before the location of the railroad on it, preparatory to showing what it was worth after the road was constructed and used. This is a common, reasonable, and necessary way of proving the *quantum* of damages when it appears that the construction and use of the road produces the difference in value," citing Wood on Railroads, p. 899; 3 Sutherland on Damages, 441.

We, therefore, conclude that defendant was entitled to prove that the value of its plant had been appreciably affected to its detriment by the

noise, smoke, cinders, jarring, discomfort, inconvenience, and other like causes incident to the running of the trains on the right of way, and by the risks and dangers of fire and of injury to employees and their children, and to show, further, that the use of the right of way, because of such things, would disorganize its help and tend to drive its operatives away, by rendering their condition uncomfortable, if not intolerable, and require the defendant to substitute a cheaper and inferior quality of labor, and thereby reduce its output and lower the standard quality of its goods; but proof of the latter should be confined to the general facts, and not descend into particulars, as to how many hands would leave, nor should it extend to an estimate of depreciation in value, based upon a capitalization of pay rolls, which will, as alleged, be incurred by the evil effects of the right of way and the trains upon the employees and their families. This would enter too much into the forbidden domain of conjecture and speculation, even if considered only as bearing upon the question of depreciation alone, or as being an independent element for the assessment of damages. It would be impossible to do more than guess as to how many hands would quit the service, or to what extent the latter would be disorganized, and a definite opinion upon such matters, dealing with the actual figures in the final estimate, would be unsatisfactory, misleading, and dangerous as the basis for fixing the total amount of damage to the plant. Questions may be asked on cross-examination, for the purpose of testing the value of a witness's testimony, which are not permissible on examination in chief by the party calling him. To be sure, even on direct examination he may give the reasons for his opinion, provided those reasons are kept within proper and competent limits, as fixed by the established rules of evidence. An improper reason does not necessarily render the opinion of the witness incompetent, as the opinion may be valid and valuable without it, resting, as it may, upon other sufficient and admissible grounds. The party objecting to any of a witness's reasons which are deemed to be incompetent may ask that they be stricken out and that the jury be instructed not to consider them.

The jury, in finding the amount of depreciation in value of the plant by the location of the right of way and the operation of trains thereon, would naturally adopt neither the opinions of men who are sanguine in their estimate of value nor of those who are overcautious, but of prudent, conservative, and practical men who have knowledge and also have had experience and an opportunity of forming correct opinions and are influenced in their judgment only by careful thought and deliberation. *R. R. v. Dudley*, 22 N. J. L., 503. It is proper, therefore, that they should have the means of knowing the qualification of the witness to give an opinion worthy of their consideration—his intelligence, of course, and the extent of his knowledge and experience. The opinion of an

ignorant man would be of no value whatever. We need not say whether an "expert" or one having no knowledge of the facts—that is, the situation of the property, its surroundings, and other pertinent matters, but merely having had experience in the management or operation of cotton mills—should be allowed to express an opinion upon the question of value or depreciation, as the point is not presented, the witnesses who testified in this case appearing to have had knowledge of those facts.

We are inclined to the opinion that some of those who testified as "experts," and perhaps some of the other witnesses, were allowed to go too much into detail and their testimony permitted to take too wide a range, by which the minds of the jurors may have been led astray by collateral and irrelevant matters; but the objections interposed to this class of testimony may be too general for notice. The incompetent parts of a mass of testimony, some of which is competent, should be clearly specified. *S. v. Ledford,* 133 N. C., 714; *Bank v. Chase,* 151 N. C., 108; *S. v. Stewart,* 156 N. C., 639; *Ricks v. Woodard,* 159 N. C., 647.

Our final conclusion is that, while the petition is disallowed, because there was error, the case will hereafter be tried in accordance with the principles stated in this opinion. The writer thought, when the case was here before, that the land was not the subject of condemnation at all, under our statute, and, therefore, his attention was not specially directed to the other questions we have discussed, and while he concurred in the result, he can well see now, after receiving more light upon the subject, that, because of the importance and intricacy of the questions, the reasons leading up to that result should be stated more fully and with closer reference to the facts, as they appear in the record, for future guidance in the case.

Petition dismissed.

W. R. LYNCH v. CAROLINA VENEER COMPANY.

(Filed 19 May, 1915.)

1. Appeal and Error—Questions and Answers—Objection and Exception.

Errors assigned to ruling out questions asked a witness will not be considered on appeal unless the relevancy or materiality of the expected answers are made to appear.

2. Evidence—Witnesses—Examination—Impeachment.

A party may not impeach his own witness by examination, though he may contradict his evidence by the testimony of another witness.

3. Master and Servant—Safe Place to Work—Negligence—Evidence—Questions for Jury.

It is the duty of an employer to furnish his employee a safe place to work, and the evidence in this case tending to show that the plaintiff was employed to work in the defendant's veneer factory on a narrow platform

between large vats of boiling water where the logs were placed for preparation and handling, in a certain manner, and that the injury was caused by the defendant not replacing a guard rail around the vats for the safety of an employee while at work, it is held that the instructions of the court applying the rule of the prudent man were properly given upon the issue of defendant's actionable negligence, placing the burden of proof on the plaintiff.

4. Master and Servant—Safe Appliances—Custom—Rule of Prudent Man.

The employer's furnishing to his employee the customary safety appliances with which to do his work is not the sole test of his responsibility, for they should also be such as commend themselves to an ordinarily prudent man.

5. Instructions—Trials.

The failure of the trial judge to give requested instructions is not erroneous when he gives them substantially in his own language in his general charge.

6. Instructions, Improper—Issues.

Prayers for instruction not addressed to the particular issue are defective, and a refusal to give them cannot be assigned for error.

7. Instructions—Contributory Negligence—Directing Verdict.

In this action to recover for a personal injury and under the evidence introduced, a prayer for instruction to find for defendant upon the issue of contributory negligence, if they find the facts to be as testified, was properly refused.

APPEAL by defendant from *Cline, J.*, at September Term, 1914, of BUNCOMBE.

Jones & Williams for plaintiffs.
Martin, Rollins & Wright for defendants.

CLARK, C. J. This is an action by an employee to recover damages for personal injuries. The defendant is the Veneer Manufacturing Company, which has in use several large vats, each 20 feet long, 10 feet wide and 6 feet deep, filled with boiling water, in which large logs are subjected to the moist heat to soften them for veneering purposes. These vats are parallel to each other, in the same room, and are surrounded by narrow platforms 5 or 6 feet wide, on which the plaintiff, with other employees, was stationed to catch the logs as they were lifted from the vat, peeling the bark off and rolling them to the veneer room. If a log was lifted from the vat of a different kind of wood from that being used at the time, it was rolled back into the vat. This duty required the plaintiff to work near the open vat and often at its very edge. The plaintiff, a young man 22 years old, had been in the employ of the company on this work two and a half months. Down to within ten days of his injury the defendant had used a rail as protection, consisting of a heavy 2 x 6 scantling laid flat and extending 10 or 12 inches above the

floor. This was not a part of the vat, but a protection. About ten days before the plaintiff's injury this railing had rotted away and had not been replaced at the time of the injury. The president of the defendant company passed by the place where the rail had rotted away three or four times a day, and the defendant's foreman testified that he knew that the railing had rotted away several days before the accident. The defendant, however, with full knowledge of the absence of the protection formerly used, continued to require his employees to peel and drag the logs on the narrow platforms, 5 or 6 feet wide, saturated with water, covered with slick bark, and adjoining deep vats filled with boiling water.

While the plaintiff was engaged in peeling and moving the logs on the platform, which that day were poplar and oak, a chestnut log was lifted from the vat, and the plaintiff in the line of his duty put it back into the vat. To do this he struck the axe, which he was furnished with for that purpose, into the end of the log, and in attempting to pull it around to put it back into the vat he slipped on a piece of bark and fell into the vat where the protection had rotted away.

The jury found, upon all the evidence, that the plaintiff was injured by the negligence of the defendant and did not contribute to his own injury, and assessed damages. From this verdict, and judgment thereon, the defendant appealed.

The defendant's exceptions 1 and 2 are because the court refused to permit witness to answer certain questions. Without considering these exceptions further, it is sufficient to say that error cannot be assigned for ruling out questions unless it is shown what replies were sought to be elicited, so that the court may see that the appellant was injured by such ruling. *Stout v. Turnpike Co.,* 157 N. C., 366; *Knight v. Killebrew,* 86 N. C., 402.

The next exception is because the defendant was not allowed to impeach a witness introduced by himself. Having offered the witness to the court as credible, the defendant could not be permitted to impeach him. It could, however, have shown a different state of facts by another witness. *Sawrey v. Murrell,* 3 N. C., 397; *S. v. Taylor,* 88 N. C., 694.

Exceptions 4 and 5 are abandoned. Exceptions 6, 7, 8, 9, 10, and 12 are to the charge; but the instructions excepted to presented merely the well settled rule of the prudent man. The court charged the jury: "Now, this is the test, gentlemen: Would a reasonably prudent man, a reasonably cautious employer of labor, under these or similar circumstances, having proper regard for the safety of his employees *and to furnish them a safe place in which to work*—and that means that regard which an ordinarily prudent man would have furnished under like or similar circumstances—would such a man have maintained this vat without some protection, railing or other protection, around it for the

safety of the employees, who had occasion to go and come around and about it in performing the work there?"

The court also charged the jury: "If you find that a reasonably prudent and cautious man would have protected this vat, with some sort of railing or other construction around it, and you are satisfied of that by the greater weight of the evidence, then it was the duty of this defendant to have done that; and if he failed to do that, such failure would be an act of negligence upon his part"; and also, "The burden is upon the plaintiff to satisfy you by the greater weight of the evidence that the defendant failed to conform to the duty of the prudent man in this respect; that is, that the defendant failed to construct and maintain its vat in the manner which the prudent man would have done who was exercising that proper regard, reasonable regard, for the safety of his employees that the law requires the employer to exercise."

The facts of this case are almost identical with those in *West v. Tanning Co.*, 154 N. C., 44, in which the plaintiff slipped into such a vat of boiling water as this, in a similar plant. It was the duty of the defendant to furnish the plaintiff with a reasonably safe working place, and the evidence was proper to be submitted to the jury that in not replacing the previous guard rail as a protection the defendant was guilty of negligence.

We cannot concur with the defendant that general custom in the use of safety appliances is the sole test of negligence. But the appliances furnished, methods employed, and places for the safety of servants should be such as commend themselves to an ordinarily prudent man. *Hornthal v. R. R.*, 167 N. C., 629; *Tate v. Mirror Co.*, 165 N. C., 280; *Ainsley v. Lumber Co., ib.*, 122.

The charge of the court in this and other respects excepted to are approved in the cases above cited, and also in *Steele v. Grant*, 166 N. C., 535; *McAlee v. Mfg. Co., ib.*, 448; *Steeley v. Lumber Co.*, 165 N. C., 27; *Reid v. Rees*, 155 N. C., 231; *Aiken v. Mfg. Co.*, 146 N. C., 324. There are other exceptions to the charge, but we do not think that they require further discussion, as they are covered by the general propositions above stated and the cases already cited.

There were twenty-four prayers for instruction handed up to the judge, and as to one of these, marked 10A, the appellant contends that it was overlooked by the court. This prayer was, "If the jury find that the defendant ordered the plaintiff not to use the axe in moving the logs around, but violating his orders, he used the axe, for that purpose and his disobedience was the proximate cause of his injury, he could not recover." Without discussing the question whether this prayer was overlooked by the judge because of the manner in which it was placed on his desk, it is sufficient to say that the judge substantially gave that prayer as No. 16 of the special instructions, as follows: "If the jury

find that suitable tools and appliances were furnished the plaintiff with which to roll and move the logs, and that the plaintiff failed to use the appliances furnished him, but used an axe, and while using the axe and attempting to move the logs, the axe pulled out, causing the plaintiff to fall in the vat, he could not recover, and it would be the duty of the jury to answer the first issue 'No.'"

Besides, it has been often held that a prayer which concludes as this, "The plaintiff cannot recover," without applying it to any issue, is defective, and a refusal to give it cannot be assigned as error. *Earnhardt v. Clement,* 137 N. C., 93; *Satterthwaite v. Goodyear, ib.,* 304; *Witsell v. R. R.,* 120 N. C., 557, and cases there cited.

Nor was it error for the court to refuse to charge the jury that if they believed the evidence, the plaintiff was guilty of contributory negligence. After careful consideration of all the exceptions, we do not find that the defendant sustained prejudice in the trial of this cause.

No error.

J. A. ROUSSEAU, RECEIVER, v. CLARENCE CALL.

(Filed 24 May, 1915.)

1. Trusts and Trustees—Voluntary Subscriptions—Equity—Receivers.

Voluntary subscriptions to build a roadway between two named points under a specified management are properly regarded as trust funds available to creditors who have made advances and supplies to the management, considered as trustees, engaged in the prosecution of the enterprise; and where it is made to appear that it is necessary to the preservation of the fund, or to a due and proper execution of the trust, a court of equity will appoint a receiver.

2. Trusts and Trustees—Personalty—Parol—Requisites.

A trust in personalty may be created by parol without the use of any particular form, and it will be recognized and enforced whenever it is manifest that a trust is intended, and the subject-matter, the purpose, *i. e.*, the disposition of the property, and the beneficiaries are designated with a reasonable degree of certainty; and while a transfer of property is usually involved, it is not an essential requirement, and a trust of this character may be and not infrequently is created when one directs that a specific debt due him or a part of it be retained or paid over by the debtor in trust for another, or gives his note for a like purpose.

3. Trusts and Trustees—Executory Trusts—Consideration.

A valid consideration must be shown to sustain a trust of an executory nature.

4. Contracts—Mutual Subscriptions—Consideration.

When persons mutually subscribe a stated sum for a definite and lawful object, the subscription of one may be regarded as a proper consideration for that of the other; and when work has been done or expenditures made or debts incurred on the faith of such subscription, it then becomes a binding obligation.

5. Receivers—Equity—Decrees—Collateral Attack.

Where in the exercise of its equitable jurisdiction the court has entered judgment appointing a receiver for the administration of a trust fund, its judgment is not open to collateral attack.

6. Trusts and Trustees—Equity—Receivers—Parties—Jurisdiction.

One who has voluntarily subscribed with others to the building of a public road under a certain management, with the effect of creating a trust for the designated purpose, is not a necessary party to a suit in which a receiver is appointed to carry out the trust, and his presence or absence does not present a jurisdictional question.

7. Trusts and Trustees — Voluntary Subscriptions — Receivers — Delinquent Subscribers—Right of Action.

Where a receiver has been duly appointed to carry out the terms of a trust created by subscriptions to build a road, he, as such, represents the rights of the management, trustee, and creditors, and the *cestui que trust* having made demand required by the terms of the subscription, is entitled to recover from delinquent subscribers any balance they may be due on their subscriptions.

8. Contracts, Written — Parol — Contemporaneous Agreement — Evidence — Statute of Frauds—Subscriptions.

The rule that when a contract, not required by law to be in writing, is partly written and partly oral, the latter may be shown, does not apply when the writing is contradicted by the oral part; and where a written list of voluntary signatures to a subscription states that the signers "subscribe and bind ourselves to pay in cash, as called for by J. M., treasurer," etc., and the purpose is to build a certain road, it is inadmissible for the subscriber to show by a contemporaneous verbal agreement that he subscribed upon other conditions than those contained in the writing, which had not been performed.

APPEAL by defendant from *Harding, J.*, at January Term, 1915, of WILKES.

Civil action to recover balance claimed on subscription to build a road, heard on appeal from a justice's court.

There were facts in evidence tending to show that defendant and others desiring to have constructed a dependable road from the railroad station in North Wilkesboro to the courthouse in Wilkesboro, the road crossing the Yadkin River between the two points, made a written subscription for the purpose in terms as follows: "For the purpose of building a sand-clay or a macadam road from the depot in North Wilkesboro, N. C., to the courthouse in Wilkesboro, N. C., under the direction of a Government expert, we, the undersigned citizens of Wilkes County, North Carolina, hereby subscribe, and bind ourselves to pay in cash as called for by J. L. Hemphill, treasurer of the road fund, the amount set opposite our respective names," to which list the defendant subscribed $100. That the road was in part built on the north side of the river, and defendant and other subscribers, having paid one-half of the subscription, refused to pay the remainder, claiming that it was the understanding and agreement of the parties, at the time the subscription was made,

that one-half was to be paid for work on the north side of the river and one-half on the south side, and that, as nothing had as yet been done on the road south of the river, that no further amount was presently collectible. It was further shown in evidence that J. L. Hemphill, designated as treasurer, and C. H. M. Tulbert, appointed as manager, for the purpose of building the road, had entered on the work and had, as stated, built a portion of the road lying on the north side of the river and had contracted debts for same, as treasurer and manager of the enterprise, and these not being paid and a number of the subscribers having failed and refused to pay their subscriptions or some part of same, a suit was instituted in the Superior Court by a creditor against said treasurer and manager for the purpose of subjecting the fund to the payment of debts incurred in prosecuting the work, and present plaintiff was therein appointed receiver and directed to make demand and collect subscriptions for the purpose indicated. This suit was then instituted, and it being made to appear that there was an unpaid balance of $50 on defendant's subscription and debts due and owing, contracted by the treasurer and manager on the faith of the fund, the court charged the jury, if they believed the evidence, the plaintiff was entitled to recover.

Judgment for the $50 unpaid balance. Defendant excepted and appealed, assigning for error, chiefly:

1. That, as to defendant, the decree appointing plaintiff receiver was void and conferred no right to maintain the present suit.

2. That his Honor committed error in excluding parol testimony offered, to the effect "That it was the understanding and agreement, at the time of subscription made, that one-half of the subscription was for work on the north side and one-half on the south side of the river."

Frank D. Hackett for plaintiff.
W. W. Barber for defendant.

HOKE, J., after stating the case: A perusal of the facts in evidence leads to the conclusion that this subscription list should properly be considered a trust fund, dedicated by the parties to the purposes of building the road, and that under recognized equitable principles it may be made available to creditors who have made advances and supplies to the trustee and manager engaged in the prosecution of the enterprise.

It is well established in this jurisdiction that a trust in personalty may be created by parol, and that no particular form of words is required for the purpose, and that the same will be recognized and enforced whenever it is manifest that a trust is intended, and the subject-matter, the purpose, *i. e.*, the disposition of the property, and the beneficiaries are designated with a reasonable degree of certainty (*Witherington v. Herring,* 140 N. C., 495; *Riggs v. Swann,* 59 N. C., 119; Perry on

Trusts (6 Ed.), sec. 82 *et seq.;* 3 Pomeroy Eq. Juris., secs. 1008, 1009, 1010; 39 Cyc., p. 56 *et seq.,* and while a transfer of property is usually involved, this is not at all an essential requirement, and a trust in personalty may be and not infrequently is created when one directs that a specified debt due him or a part of it be retained or paid over by the debtor in trust for another or gives his own note for a like purpose—the instance more nearly presented here. *Burris v. Brooks,* 118 N. C., 789; *Eaton v. Cook,* 25 N. J. Eq., p. 55; *Baylies v. Payson,* 87 Mass., 473; *Fletcher v. Morey,* 2 Story, 555; *Legard v. Hodges,* 1 Ves., Jr., 477. The statement being made always in reference to the position that when the trust is executory a valid consideration must be shown. 2 Perry on Trusts (6 Ed.), sec. 359.

This, then, in our opinion, being a trust fund for a designated purpose, it was clearly within the power of the court, exercising jurisdiction in law and equity, to appoint a receiver whenever it was sufficiently made to appear that such a course was necessary to the preservation of the fund or a due and proper execution of the trust. 5 Pomeroy Eq. Jur., sec. 89; Kerr on Receivers, pp. 20 and 21; Alderson on Receivers, sec. 474. True it is that the possession and control of a trustee will not be disturbed on light or insufficient grounds (2 Perry on Trusts, sec. 819), but the power being conceded or existent beyond question and the court, in the exercise of its jurisdiction, having entered judgment appointing plaintiff receiver, its judgment is not open to collateral attack, and, even if the order was improvidently made, its propriety is not open to question in this suit.

The position urged, that defendant was not notified in that action and, therefore, the decree is void as to him, is without merit. That was an action looking only to the preservation of the trust fund, and in which the creditors, the beneficiaries and the treasurer, the trustee of the fund, and also the general manager of the enterprise, were made parties.

So far as we can now see, the defendant was not interested in any issue there presented; assuredly he could not be considered a necessary party to that suit, and his presence or absence, therefore, does not present a jurisdictional question.

The plaintiff, then, having been properly appointed receiver by a court having jurisdiction of the cause and, as such, representing the rights of the treasurer, the trustee, and the creditors, the *cestui que trust,* having made demand required by the terms of the subscription, is entitled to recover the balance due, and we concur in the ruling of his Honor, that, on the facts in evidence, it was not open to defendant to show that one-half of his subscription was to be expended on the portion of the road lying south of the river.

It is held in this jurisdiction that when persons mutually subscribe a stated sum for a definite and lawful object, the subscription of one may

be regarded as a proper consideration for that of the other (*University v. Borden,* 132 N. C., pp. 477-491), and it is very generally recognized that when work has been done or expenditures made or debts incurred on the faith of such a subscription, it then becomes a binding obligation (*Pipkin v. Robinson,* 48 N. C., p. 152, and 37 Cyc., p. 486), and, when or to the extent that it has been expressed in writing, it comes under the principle obtaining in other written contracts, that it may not be changed or sensibly impaired by parol. *Crane v. Library Assn.,* 29 N. J. L.; *Burham v. Johnson,* 15 Wis., 286; 37 Cyc., p. 504.

True, it is subject also to another position, equally well recognized, that when part of a contract only is in writing, the additional terms may be established by parol evidence; but this position is not allowed to prevail against the part which is written, for in such case, as said by the *Chief Justice* in *Walker v. Venters,* 148 N. C., 388, "the written word abides." In the present case the subscription contains in writing the provision that the signers "subscribe and bind ourselves to pay in cash, as called for by J. M. Hemphill, treasurer of the road fund, the amount set opposite our respective names." Here is express and definite stipulation as to character and time of payment, and it was not permissible to vary such a provision by the parol evidence offered in direct contradiction of its written terms. We are not inadvertent to the case of *Kelly v. Oliver,* 113 N. C., 442, in which it was held competent for a defendant, sued on a subscription list, to show that this was not to become a binding obligation except on certain conditions that had not been complied with, a position which has been frequently approved and applied with us, as in *Pratt v. Chaffin,* 136 N. C., 350; *Bowser v. Tarry,* 156 N. C., 35; *Garrison v. Machine Co.,* 159 N. C., 285, and other cases. That evidence was admitted to show that the written instrument or stipulation in question had never become the contract of the parties, and the ruling did not and was not intended to affect the principle that a written contract could not changed or varied by parol.

The present case comes rather within the decision in *Pipkin v. Robinson,* 48 N. C., 152.

We find no reversible error, and the judgment in plaintiff's favor is affirmed.

No error.

HYATT & CO. v. GEORGE W. CLARK ET AL.

(Filed 24 May, 1915.)

1. Judgments—Vendor and Vendee—Goods Sold and Delivered—Pleadings—Allegations—Implied Promise to Pay—Default Final.

Upon allegations of a complaint of goods sold and delivered to the defendant in accordance with an attached itemized statement showing dates, kind, quantity, and price, alleging the prices were known to defendant at the time of purchase, a judgment final in the amount stated may be entered for the want of an answer, there being an implied promise to pay the stated price; and an inquiry not being required.

2. Judgments, Set Aside—Meritorious Defense—Excusable Neglect—Findings—Appeal and Error.

A judgment by default of an answer should not be set aside unless it appears that the defendant has a meritorious or valid defense and excusable neglect is shown by him; and the findings of fact thereon by the trial judge is conclusive on appeal.

APPEAL by defendant from *Justice, J.*, at July Term, 1914, of HAYWOOD.

This is a motion to set aside a judgment by default final, rendered in the Superior Court of Haywood County. His Honor refused to set aside the judgment, and the defendant appealed.

Morgan & Ward, John M. Queen for plaintiff.
J. W. Ferguson, M. Silver for defendant.

BROWN, J. The complaint alleges that the plaintiffs were doing business as Hyatt & Co., a copartnership, and engaged in the livery business and the sale of feedstuffs for animals; that the defendants were partners, doing a general logging business; that the plaintiff sold and delivered to the above named defendants, and at their request, certain amounts of feed and feedstuff, and furnished feed for the said defendants herein named for their stock, and furnished the said defendants certain conveyances at the request of the said defendants, at the times and for the prices set forth, as is set out in the itemized statement hereto attached and marked Exhibit "A," which itemized statement and amounts are made a part of this complaint; that the defendants have failed to pay the plaintiffs for the said feed, feedstuff, and livery so furnished them by the plaintiff.

The defendants failing to answer the said complaint at July Term, 1914, the court rendered judgment final by default for the sum of $350.53, according to the itemized statement attached to the complaint. It is contended by the defendant appellant S. M. Smith that the said judgment is irregular, and only a judgment by default and inquiry could have been rendered.

While the language of the complaint is somewhat doubtful as to its meaning, we are of opinion that it is fairly susceptible of the construction that the feedstuff and merchandise were sold and delivered at the prices set forth, and that these prices were known to the defendant at the time of the purchase, and that there was an implied promise to pay the same. Upon the same principle, where a customer goes into a merchant's store, ascertains the price of certain goods, and takes them, there is an implied promise upon the part of the customer to pay that price. *Hartman v. Farior,* 95 N. C., 177.

This case is easily distinguished from *Witt v. Long,* 93 N. C., 391. In that case there was no allegation in the complaint that the goods were sold at certain prices, and there was no schedule of the prices attached to the complaint at which the goods were sold. In that case the sum to be paid was not fixed by the terms of the contract, and it could not be implied from it, nor could the same be ascertained from the complaint by computation, because there was no allegation of a fixed price at which the goods had been sold. *Currie v. Mining Co.,* 157 N. C., 220.

But even if the allegations of the complaint had not been sufficient for judgment by default final, and the judgment by default final was irregular, his Honor was correct in not setting aside the judgment, because the defendant has no meritorious or valid defense, and did not show any excusable neglect, as was found by his Honor in the judgment and findings of fact, and these findings of fact are conclusive. *Jeffries v. Aaron,* 120 N. C., 167; *Mauney v. Gidney,* 88 N. C., 200; *Osborn v. Leach,* 133 N. C., 427; *Pierce v. Eller,* 167 N. C., 672; *Marsh v. Griffin,* 123 N. C., 669; *Dell School v. Pierce,* 163 N. C., 424; *Norton v. McLaurin,* 125 N. C., 185.

In *Jeffries v. Aaron,* 120 N. C., 169, the Court held that "Although there was irregularity in entering the judgment, yet unless the Court can now see reasonably that the defendant had a good defense, or that they could now make a defense that would affect a judgment, why should it engage in the vain work of setting the judgment aside now, and then be called upon soon thereafter to render just such another between the same parties?"

The judgment is

Affirmed.

BANK OF MURPHY v. MURPHY FURNITURE COMPANY, W. H. WOODBURY, ET ALS.

(Filed 24 May, 1915.)

1. Contracts, Written—Interpretation—Intent.

A written contract or agreement should be interpreted to carry out the intention of the parties as gathered from the language used therein, the nature of the instrument in proper instances, from the condition of the parties executing it and the objects they had in view.

2. Same—Guarantors of Payment.

While in contracts of guaranty words of ambiguous and doubtful import are construed most strongly against the guarantor, this rule will not be extended to enlarge the obligations of the guarantor beyond the scope and purpose of his agreement and the reasonable interpretation of the terms expressed therein.

3. Same—Bills and Notes—Banks and Banking—Third Parties.

Where the directors of a corporation enter into a written agreement with its banking house to pay all of its indebtedness thereto "which now exists or may hereafter be created, whether by note, acceptance, overdraft, indorsement," etc., to the extent of a certain amount, and the agreement sets forth that it is to avoid the necessity of individual indorsement of the directors in each transaction to the said bank, it is *Held*, that by proper interpretation of the contract and the conditions existing at the time the guaranty applied to transactions between the corporation and the bank, and it was not intended or agreed that the directors should become liable on a note given by the corporation to a third person and discounted in a transaction solely between such third person and the bank.

APPEAL by plaintiff from *Justice, J.*, at November Term, 1914, of CHEROKEE.

Civil action to recover on certain notes, aggregating $2,076.62, executed by the furniture company to one C. D. Mayfield, for lumber sold said company and by him discounted for value to plaintiff bank.

Judgment by default was entered against the company, and it was claimed by plaintiff that the individual defendants were liable for this indebtedness by reason of the following contract signed by them and existent at the time plaintiff bank acquired the notes:

"We, the undersigned stockholders (being also directors) of the Murphy Furniture Manufacturing Company, a corporation, hereinafter called the company, in consideration of the sum of $1 to each of us in hand paid, the receipt whereof we severally acknowledge, and in consideration of the credit extended to said company by the Bank of Murphy, hereinafter called the bank, hereby bind ourselves and agree to pay to said bank all indebtedness of said company to said bank which now exists or may hereafter be created, whether by note, acceptance, overdraft, indorsement, or any other form, to the extent of $12,000.

"This agreement is made in order to avoid the necessity and inconvenience of indorsing specifically every evidence of indebtedness which

said bank may hold against said company, and its true intent and purpose is to make the undersigned parties hereto liable for said indebtedness in such manner and to the same extent as if each of us had duly and regularly indorsed the paper of said company to said bank; and in the event of liability accruing under this agreement, each of us shall be jointly and severally liable to said bank for such indebtedness as indorsers are liable to the holder of the negotiable instrument under the law.

"Each of us hereby severally waives all rights to homestead or exemption under the laws of this or any other State or the United States, and we severally waive demand, protest, and notice of demand, protest, and nonpayment of any and all papers of said company to said bank.

"No further credit is to be extended under this guaranty after notice given in writing by any one of the undersigned parties not to do so."

It was contended for the individual defendants: "That at the time said agreement was executed and delivered, said Murphy Furniture Manufacturing Company was indebted to said bank for moneys heretofore borrowed from it, and was from time to time borrowing money from said bank, and upon notes executed to it directly by said company, or upon paper of other persons due said manufacturing company, which was discounted by the latter to the plaintiff bank, and that said agreement was intended to cover such transactions had directly between the plaintiff bank and said Murphy Furniture Manufacturing Company, and was not intended to cover and include the purchase of notes given by said Murphy Furniture Company to other parties, and which may have been sold by such persons to said bank and indorsed by the holders thereof and discounted by said bank, the proceeds of which were not being credited to Murphy Furniture Manufacturing Company."

The notes sued on having been introduced and the agreement, it was admitted on the trial that said notes were executed by the company to one C. D. Mayfield and thereafter sold and discounted by him to plaintiff bank, and that same were unpaid.

His Honor charged the jury that, if they believed the evidence, they would answer the issue for defendants. Judgment, and plaintiff excepted and appealed.

M. W. Bell, Dillard & Hill for plaintiff.

HOKE, J. In *R. R. v. R. R.*, 147 N. C., 382, the Court, in speaking of the interpretation of written contracts which are sufficiently ambiguous to permit of construction, said: "It is well recognized that the object of all rules of interpretation is to arrive at the intention of the parties as expressed in the contract, and, in written contracts which permit of construction, this intent is to be gathered from the entire instrument"; and,

after citing Page on Contracts, secs. 1105, 1106 and 1112, and *Merriam v. U. S.*, 107 U. S., 441, the opinion further quotes with approval from Beach on the Modern Law of Contracts, as follows: "To ascertain the intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects they had in view, and the words employed, if capable of more than one meaning, are to be given that meaning which it is apparent the parties intended them to have."

Applying these principles, we concur in his Honor's view, that plaintiffs are not entitled to recover of the individual defendants.

The evident purpose of these parties was to strengthen the credit of their company in its dealings with the bank, to the extent of the amount stipulated, and to save themselves the "necessity and inconvenience of indorsing specifically every indebtedness which said bank might hold against the company," and from a consideration of this purpose and the language of the instrument and the facts in evidence we think it clear that it was the intention of these parties, as expressed in the contract, to confine the obligation of the individual defendants to indebtedness arising out of transactions directly between the bank and their company, and that it did not and was not intended to include any and every indebtedness which the bank might acquire from third parties.

While the position insisted on by plaintiff, that in contracts of guaranty words of ambiguous and doubtful import are construed most strongly against the guarantor, will be recognized, in proper instances, it may not be extended to enlarge the obligations of such parties beyond the scope and purpose of their agreement and of the terms in which the same has been expressed. *Shoe Co. v. Peacock*, 150 N. C., 545.

There is no error in the charge of the court, and the judgment for defendants is affirmed.

No error.

J. H. FOSTER, ADMINISTRATOR, v. TOWN OF TRYON.

(Filed 12 May, 1915.)

1. Cities and Towns—Streets—Negligence—Defects—Notice.

The liability of an incorporated town for injuries caused by the faulty condition of its streets depends upon whether the town through its proper officers had actual or constructive notice of the defect causing the injury or could have avoided it in the exercise of reasonable diligence.

2. Same—Trials—Questions for Jury.

The doctrine of constructive notice of a defect in the street of an incorporated town which will render it liable for an injury thereby proximately caused, rests upon its duty to inspect and repair its streets, and whether in the reasonable exercise of this duty the defect should have been dis-

covered and repaired in time by the proper officers of the town, ordinarily presents a question for the determination of the jury, depending upon the circumstances of each particular case.

3. Same—Evidence—Nonsuit.

The plaintiff's intestate was killed on one of the principal streets of the defendant incorporated town by a fall of the horse upon which he was riding, caused by the foot of the animal entering a hole in the top of a culvert extending across the street. There was evidence from an examination of the culvert that it had been faultily constructed in the respect complained of, that the defect was readily discernible, and located where several of the aldermen were accustomed to pass; that it had existed for several days, and on the day in question and an hour or two before the injury it had been called to the attention of the officer of the defendant whose duty it was to repair it, and when he was within 300 yards of the place. *Held*, evidence of defendant's actionable negligence sufficient to take the case to the jury, and defendant's motion to nonsuit thereon was properly denied.

APPEAL by defendant from *Webb, J.*, at September Term, 1914, of POLK.

This is an action to recover damages for wrongful death, the plaintiff alleging that his intestate was killed by the negligence of the defendant.

The intestate, a boy about 12 years of age, was riding on horseback on one of the principal streets of the defendant town, when his horse stepped in a hole about 6 or 8 inches wide, 10 or 12 inches long, and 18 inches deep, and stumbled and caused the death of the intestate by throwing him or falling on him.

There was a verdict and judgment for the plaintiff, and the defendant appealed, assigning as error the refusal of his Honor to enter judgment of nonsuit upon the conclusion of the whole evidence.

Spainhour & Mull for plaintiff.
Solomon Gallert, Smith, Shipman & Bridgers for defendant.

ALLEN, J. The duty which municipal corporations owe to those using their streets, and the degree of responsibility imposed upon them by law, are stated clearly and accurately by *Associate Justice Hoke* in *Fitzgerald v. Concord,* 140 N. C., 110, which has been approved in *Brown v. Durham,* 141 N. C., 252; *Revis v. Raleigh,* 150 N. C., 353; *Johnson v. Raleigh,* 156 N. C., 271; *Bailey v. Winston,* 157 N. C., 259, and in other cases. He says: "The governing authorities of a town are charged with the duty of keeping their streets and sidewalks, drains, culverts, etc., in a reasonably safe condition; and their duty does not end at all with putting them in a safe and sound condition originally, but they are required to keep them so to the extent that this can be accomplished by proper and reasonable care and continuing supervision. . . . The town, however, is not held to warrant that the condition of its streets, etc., shall be at all times absolutely safe. It is only responsible for negligent breach

of duty, and to establish such responsibility it is not sufficient to show that a defect exists and an injury has been caused thereby. It must be further shown that the officers of the town 'knew or by ordinary diligence might have discovered the defect, and the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated.' "

Notice of the defect in or dangerous condition of the street may be actual or constructive, and knowledge will be imputed to the corporation if its officers could by the exercise of ordinary care discover the defect and remedy it.

The doctrine of constructive notice rests upon the duty to inspect and repair, or, as stated by *Justice Walker* in *Bailey v. Winston, supra,* "The duty to exercise a reasonable and continuing supervision over its streets in order that it may know they are kept in safe and sound condition for use."

Speaking of the necessity for notice and of the circumstances under which it will be implied, Mr. Elliott says, in his Treatise on Roads and Streets, sec. 806 *et seq.:* "Whether a defect in a street is caused by the act of a third person or by the failure of the city to repair, there is, in general, no liability on the part of the city unless it has, or ought to have had, due notice of the defect. It is not necessary, however, that it should have actual notice; constructive notice is sufficient. Whenever the defect has existed for such a length of time and under such circumstances that the city or its officers, in the exercise of proper care and diligence, ought to have obtained knowledge of the defect, notice thereof will be presumed. Having means of knowledge and negligently remaining ignorant is equivalent to knowledge. It is generally for the jury to determine as a question of fact whether a city has notice or not. . . . The length of time during which a defect or an obstruction is required to exist in order to charge a city with notice must, however, depend largely on the nature of the defect and the circumstances of the particular case. . . . Where the defect is caused by the municipality itself, or where it makes the improvement, it is bound to take notice of such defects as ordinary skill and prudence will reveal. . . . Where actual notice is relied upon to charge the city with negligence respecting streets, it is sufficient if brought home to a proper officer charged with their maintenance and supervision. Thus, notice to a street commissioner or a road overseer is notice to the corporation."

The authorities in our State also support the proposition stated by Mr. Elliott, that the question of constructive notice is generally a question for the jury, and this is true because the conditions are so varying under which the principle will be applied that it is impossible in most cases to declare as matter of law that there is or is not constructive notice.

The locality in which the defect exists, whether in a remote section or in a much used and frequented street, the conspicuousness of the defect, so that it may be readily discovered, and other circumstances, have to be considered.

In *Brewster v. Elizabeth City,* 142 N. C., 11, *Justice Brown,* discussing the question of constructive notice and the knowledge of defects which may be inferred from the length of time they have continued, says: "It is not for the court to draw such inference. It is peculiarly a matter for the jury, to be determined upon all the facts and circumstances in evidence."

If these principles are applied to the evidence, the conclusion must follow that the motion for judgment of nonsuit was properly denied.

The hole into which the horse stepped was in a culvert or wooden box running across the street for the purpose of carrying water from one side to the other, and which was a little under the surface of the street.

The evidence offered by the plaintiff tends to prove that the intestate of the plaintiff was killed by reason of the horse stepping in this hole, and there is evidence that this culvert was originally constructed in a faulty and negligent manner, in that at this place the planks on the top of the culvert near the surface failed to meet by 6 or 8 inches, and that a stone not large enough to completely cover it was placed over this opening between the ends of the planks and the hole covered with dirt. This was on one of the principal streets of the defendant, where there was much travel, and it could be reasonably anticipated that the travel would cause the dirt to fall into the empty box beneath and leave the hole near the center of the street. There was also evidence tending to prove that the hole was seen by one witness two or three days before the intestate was killed, by another witness on the day before, and that the officer of the defendant whose duty it was to repair the streets was notified of the existence of the hole an hour or two before the death of the intestate, and that he at the time of this notice was within 300 yards of the hole.

It is also in evidence that the hole could be easily seen, that it was in a conspicuous place, and that the commissioner of streets of the defendant passed by the place where the intestate was killed from four to six times a day.

The jury could reasonably infer from this evidence that the hole was near the center of one of the most important streets of the defendant, that it could be easily seen, that it could be repaired in a very short time, and that by the exercise of ordinary care in the performance of the duty imposed upon the defendant to inspect and repair its streets the death of the intestate could have been averted.

No error.

W. E. HARDISTER, ADMINISTRATOR OF W. W. SANDERS,
v. R. P. RICHARDSON.

(Filed 19 May, 1915.)

1. Master and Servant—Negligence—Evidence—Trials—Questions for Jury—Nonsuit.

In an action to recover damages for the alleged negligent killing of plaintiff's intestate employed to work in the defendant's mine, there was evidence tending to show that up to ten days of the death of the intestate the defendant had used a "bucket" operated by steam power to haul up the ore and employees from a 250-foot shaft, using certain different signals before hauling up the ore and employees; and without change of rules, defendant put in an appliance known as a "skip," which ran upon iron rails, in place of the "bucket," without notifying the operator of the hoisting engine that the use of the "skip" was forbidden the employees; that the defendant and his foreman rode upon the "skip" under the same rules applying to the "bucket"; that the skip was derailed at a distance of 50 feet up the shaft, and threw the intestate down to his death, and that the customary signals had been exchanged with the "hoisterman" operating the engine that employees were on the "skip," and that the "skip" could have been rendered safe with a simple device. *Held*, sufficient upon the question of actionable negligence to be submitted to the jury, of the permissive use of the skip, and defendant's motion to nonsuit was properly refused.

2. Master and Servant—Negligence—Dangerous Appliances—Invitation Implied.

In an action for damages for the negligent killing of plaintiff's intestate, an employee in defendant's mine, in being thrown from a "skip" while riding on it to the surface of the ground, it is held that the defendant and his superintendent riding on the "skip" in the same manner was an implied invitation to the employees to do so, in the absence of evidence to the contrary.

3. Trials—Evidence—Hearsay—Dangerous Appliances—Inhibited Use.

Where plaintiff's intestate has been killed while being carried to the surface of the ground after working in defendant's mine as an employee, it is incompetent as hearsay for the defendant to show by another employee, a witness, what he had been told with regard to not using the device, when such is not for the purpose of impeachment.

4. Master and Servant—Negligence—Dangerous Appliance—Res Ipsa Loquitur—Evidence—Instructions.

Where an employee in a mine is killed while coming to the surface of the earth on an implement called a "skip" operated by power, and in the customary way, which could have been made safe by the use of a simple device; and the death was caused by the "skip" jumping the rail and throwing the intestate to the bottom of the shaft, it is *Held*, that the doctrine of *res ipsa loquitur*, with the other circumstances of the case, should be submitted to the jury upon the issue of defendant's actionable negligence. The charge in this case is approved.

APPEAL by defendant from *Adams*, *J.*, at December Term, 1914, of RANDOLPH.

Civil action, tried upon these issues:

1. Was the death of the plaintiff's intestate caused by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

2. Did said intestate, by his own negligence, contribute to the injury causing his death? Answer: "No."

3. What damages, if any, is plaintiff entitled to recover? Answer: "$2,500."

Defendant appealed.

Hammer & Kelly for plaintiff.
J. A. Spence, J. M. Brown & Son for defendant.

BROWN, J. There are three assignments of error: (1) overruling motion to nonsuit; (2) excluding evidence of witness Jeff Parish; (3) to an instruction of the court to the jury.

(1) The evidence, taken in its most favorable view for plaintiff, tends to prove that for some time prior to his death plaintiff's intestate was employed by defendant to work in a gold mine as an underground hand; that the shaft of the mine had been sunk to a depth of 250 feet; that when intestate began work a "bucket" was used by defendant for the purpose of drawing ore and employees out of the mine, and the defendant had adopted and posted written rules governing the use of this "bucket"; that these rules prescribed a certain number of rings of a bell as a signal to the "hoisterman" that the "bucket" was loaded with ore, and for a certain other number as a signal that men were on; that the "bucket" was drawn up by means of a cable which wound round a drum, which drum was caused to revolve by means of a steam engine, the operator of this engine being known as a "hoisterman"; that there was also a ladder running from the bottom of the shaft to the surface; that the employees of defendant habitually rode in this "bucket," using the signals prescribed in said printed rules with the knowledge and by the permission of defendant; that this bucket remained in use until about ten days before the death of the intestate, when it was displaced by a car known as a "skip," which ran upon iron rails; that the aforesaid rules were used to govern the use of the skip; that defendant and his foreman rode upon the skip, and used these same rules which were used for the bucket; that the operator of the hoisting engine was not notified that the rules governing the use of the skip were different from those which had been used for the bucket; he was never notified that there was a rule forbidding the use of the skip by employees.

The skip was a self-dumper, the bed not being fastened securely to the body thereof; that an inexpensive chain or hook would have made the "skip" perfectly safe; that on the day of intestate's death, intestate and two other members of his crew, one of them, Neill Class, being in charge of the crew, gave the prescribed signal indicating that there were men aboard; this signal was answered by the hoisterman, indicating that he understood same, and the skip was then put in motion, and after being

drawn up about 50 feet, was derailed and turned bottom upward, throwing intestate and his companions out and instantly killing them.

There is abundant evidence of contributory negligence, tending to prove that the intestate was personally forbidden by the foreman to ride on the skip. All this character of evidence was offered by the defendant, and doubtless properly submitted to the consideration of the jury under that issue. There is no assignment of error relating to the evidence or to the charge upon the second issue, and it is presumed, therefore, that defendant is content therewith.

We think there is evidence sufficient to be submitted to the jury of a permissive user of the skip.

It is admitted that the employees used the bucket constantly until it was displaced by the skip. When this was substituted, the defendant's plain duty was to notify his employees not to use it. By directing the hoisterman not to bring the workmen up on the skip, defendant could most effectually have prevented its use for such purpose. He knew the miners had been using the bucket, and he must have known they would use the skip. To a man worn out with a day's toil in a mine the temptation to use the skip rather than climb up 250 feet on a ladder is almost irresistible. Besides, the defendant and his foreman set the example and rode in the skip several times, using the same signals which had been used for the bucket, thereby adopting the same signals for the skip that had been in use for the bucket; this was an implied invitation to the employees to ride the skip. "Actions speak louder than words," and by this conduct defendant told his employees that the skip was safe for their use.

The testimony of several of the employees tends to prove that they and their associates knew nothing of the existence of a rule forbidding the use of the skip by them.

There is evidence tending to prove that a hook and chain fastened to the skip would have made the skip perfectly safe and prevented the derailment which caused the death of the intestate and his companions.

The motion to nonsuit was properly overruled.

(2) The defendant asked witness Cranford this question: "What did Jeff Parrish tell you with reference to riding on that skip?" Plaintiff objects; sustained; exception.

The declarations of Jeff Parrish to Cranford are hearsay and incompetent. They were not offered to contradict Parrish, for he had not been examined as a witness. He was afterwards introduced and examined as a witness for defendant, and no such question was asked him.

(3) The defendant excepts to the following part of his Honor's charge: "Now, if you find, from the evidence, that the defendant used the car for the purpose of carrying his employees from the mine to the surface,

and that the intestate boarded the car for that purpose, and the car was derailed while in transit, before it reached the surface, and the intestate thereby thrown down the shaft and killed, you may consider such derailment as a circumstance in connection with other evidence in finding whether the defendant was negligent in the respects complained of; that is, you may consider the fact of derailment, if you find from the evidence that the car was derailed, as a circumstance tending to show negligence.

"Plaintiff contends that there is other evidence which should be considered by the jury in connection with this, and that upon all the evidence the jury should find that there was negligence on the part of the defendant; that the car referred to was a self-dumping car; that the bail was connected with the car near the rear part; that there was no chain or other appliance used in connection with the car for the purpose of securing it upon the rails.

"The defendant contends that the car was such as was approved and in general use among the mines at that time for the purpose for which it was installed; that it was not intended for use by the employees in the mine, and that it was safe for the purpose for which it was constructed and operated.

"Now, you are to consider the evidence relating to these contentions of the parties, and, after finding the facts from the evidence, and applying the principle which has been stated, say whether the plaintiff's intestate was killed by the negligence of the defendant, and whether such negligence was the proximate cause of his death."

The ground of the objection is that there is no evidence to support it, and that his Honor applied the doctrine of *res ipsa loquitur*.

As we have said, there is abundant evidence of a permissive user of the skip, and that it could have been made reasonably safe.

His Honor very properly and correctly allowed the jury to consider the *res ipsa loquitur* as a circumstance in evidence tending with the other evidence to prove negligence. *Ridge v. R. R.*, 167 N. C., 518, and cases there cited.

No error.

B. R. RAINES, ADMINISTRATOR, v. SOUTHERN RAILWAY COMPANY.

(Filed 19 May, 1915.)

1. Master and Servant—Contributory Negligence—Infants—Trials—Evidence—Instructions.

In an action to recover damages of a railway company for the negligent killing of plaintiff's intestate, a member of its section crew, there was evidence that the intestate, a boy between 15 and 16 years of age, was sent out to flag an approaching train, and was struck by this train and killed while endeavoring to do so. *Held*, the degree of care required of

the intestate upon the issue of contributory negligence is that which a boy of his age and knowledge would have taken in the exercise of ordinary prudence, under the circumstances, also requiring that his contributory negligence, if established, should be the proximate cause of the injury; and an instruction which leaves out of consideration the elements of age, experience, and proximate cause constitutes reversible error.

2. Instructions, Contradictory—Appeal and Error—Harmless Error.

An erroneous instruction is not rendered harmless by another and correct instruction upon the same phase of the case, unless the former has been retracted or by a proper explanation the wrong impression made thereby has been eliminated from the minds of the jury.

3. Master and Servant—Railroads—Flagging Train—Contributory Negligence—Proximate Cause.

Where the plaintiff's intestate, an employee of defendant railroad company, has been run over or killed by an approaching train he had been sent out to flag, the negligent failure of the defendant's employees thereon to stop the train, after discovering intestate's dangerous position, will be regarded as the proximate cause of the injury, though the intestate himself may have theretofore been negligent in placing himself in such perilous position.

4. Master and Servant — Federal Employer's Liability Act — Contributory Negligence.

The Federal Employer's Liability Act does not change the doctrine of contributory negligence except as to its legal effect upon the issue of damages, in reducing the amount as indicated in the act instead of being a defense to the action.

5. Master and Servant—Federal Employer's Liability Act—Reasonable Expectation—Measure of Damages—Instructions.

The measure of damages recoverable by the father of an employee of a railroad company under the Federal Employer's Liability Act is according to the reasonable expectation of the benefit which would accrue to the parent by the continuance of the life in question, and an instruction is erroneous which requires the plaintiff to satisfy the jury by the greater weight of the evidence that the intestate would have continued to contribute to the support of his father, and that, in that event, they should find the present worth of such contributions from the time he was killed.

6. Master and Servant—Federal Employer's Liability Act—Reasonable Expectation—Evidence.

In an action by the father to recover damages for the negligent killing of his minor son, under the Federal Employer's Liability Act, there was evidence that the intestate was a boy in good health, earning $1.10 per day, contributed regularly to the support of his father; was sober, industrious, of the average intelligence for his age; that his conduct towards his father indicated a proper conception of his filial duty. *Held*, sufficient to be submitted to the jury upon the right of recovery for the reasonable expectation which the father had of benefit or pecuniary aid, or other advantage of gift or inheritance, if the death of the intestate had not been negligently caused by the defendant.

APPEAL by plaintiff from *Webb, J.*, at February Term, 1915, of BUNCOMBE.

The son of the plaintiff, who was named Bub Raines, was employed by the defendant as a member of the section crew on its line between

Asheville, N. C., and Spartanburg, S. C., and at the time of the accident he had been sent out to flag an approaching train. In attempting to do so, he was struck by the train and killed. At the time he was between 15 and 16 years old. With reference to his contributory negligence the court instructed the jury as follows: "If he sat down near the track in a dangerous position—if you find he thought that he was far enough away—if he put himself in a perilous position on the railroad track, and he was killed, the court charges you that he would be guilty of contributory negligence, and it would be your duty to answer the second issue 'Yes.'"

Upon the third issue, as to damages, the court charged the jury as follows: "There is no presumption in law that Bub Raines would have contributed to the support of his father after he arrived at the age of 21 years, and the burden is on the plaintiff to satisfy the jury by the greater weight of the testimony that he would have continued to contribute to the support of his father after he arrived at the age of 21 years; and the burden is also upon the plaintiff to satisfy the jury as to the amount of the contribution he would have made to his father after arriving at the age of 21 years, and unless the jury are satisfied by the greater weight of the testimony that he would have contributed to the support of his father after reaching the age of 21 years, then the jury could only award in this case, if they come to the issue of damages, the present value of such contributions as you find from the evidence Bub Raines would have made to his father from the time he was killed until he reached the age of 21 years."

Exceptions were duly taken to these instructions and each of them.

The jury returned the following verdict:

1. Was the plaintiff's intestate, Bub Raines, killed by the negligence of the defendant Southern Railway Company, as alleged in the complaint? Answer: "Yes."

2. Did the plaintiff's intestate, Bub Raines, by his own negligence, contribute to his death, as alleged in the answer? Answer: "Yes."

3. What amount, if any, is the plaintiff entitled to recover? Answer: "$192."

Judgment was entered thereon, and plaintiff appealed.

Jones & Williams for plaintiff.
Martin, Rollins & Wright for defendant.

WALKER, J., after stating the case: The charge as to contributory negligence and damages was erroneous. If the plaintiff was young and inexperienced, and was not provided with the means of giving the signal, with due regard to his own safety, and by reason thereof he was killed while in the exercise of that degree of care for his own protection which

a person of his age, intelligence, and experience would ordinarily have given under the circumstances, he would not be guilty of contributory negligence. *Ensley v. Lumber Co.*, 165 N. C., 687; *Alexander v. Statesville*, 105 N. C., 527. In the case last cited we said: "The rule of law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly, and cannot be visited upon another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of 3 years of age less caution would required than of one of 7; and of a child of 7, less than of one of 12 or 15. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case," citing *Murray v. R. R.*, 93 N. C., 92; *Bottom v. R. R.*, 114 N. C., 699; *R. R. v. Gladman*, 15 Wall. (U. S.), 401; *R. R. v. Stout*, 17 Wall. (U. S.), 657; *Morgan v. R. R.*, 38 N. Y., 455; Sh. and Redf. on Neg., sec. 49, and other authorities. All that is required of an infant is that he exercise care and prudence equal to his capacity. *Robinson v. Cone*, 22 Vt., 213. Examined in the light of this rule, the instruction as to contributory negligence was too broad, and should have been restricted to its proper limits. If the decedent was standing too near the track, or at a place near the track which brought him within the zone of danger, and his exposure to injury was not the result of any failure to exercise that degree of care which one of his age and knowledge would have taken for his safety under the circumstances, his act would not necessarily be contributory negligence. He was not an intruder or "licensee," within the rule of some of the cases cited by appellee. If a person places himself on a track in front of a moving train, or too near thereto for safety, and does so willfully or designedly or negligently, he must take the consequences; but where the act was not willful (and it was not so in this case), it must have been negligent in order to authorize a finding of contributory fault on his part, and the negligence must have been the proximate cause of the injury. The court excluded this question of negligence from the consideration of the jury when it gave the instruction that "If he sat near the track in a dangerous position—if you find that he thought that he was far enough away, . . . it would be your duty to answer the second issue 'Yes.'" The alternative proposition, that "if he put himself in a perilous position on the railroad track" it would be contributory negligence, if it was correct, did not cure the error, as we cannot tell by which branch of the instruction the jury were guided to their verdict. *Tillett v. R. R.*, 115 N. C., 662; *Williams v. Haid*, 118 N. C., 481; *Edwards v. R. R.*, 129 N. C., 78.

An error in the charge must be eliminated by a retraction of it, or a proper explanation, which will remove the wrong impression made by it, and the giving of another correct but conflicting instruction does not answer the purpose, as it does not produce the desired result. If the deceased had fallen asleep on the track, his negligence in doing so would not be contributory, in a legal sense, unless it was the proximate cause of the injury to him; and yet the court charged the jury, in effect, that it would be. If, notwithstanding his negligence in sleeping on the track, the defendant's engineer, after he saw him lying there and became aware of his perilous situation, could, by exercising the proper care, have stopped the train in time to avoid the injury, and failed to do so, his negligence in not doing so would be considered as the proximate cause of intestate's death. The Federal Employers' Liability Act does not, as we understand it, change the rule of law as to what is contributory negligence, except as to its legal effect upon the issue as to damages, an affirmative finding in respect of such negligence reducing the amount of damages as indicated in the act.

We are also of the opinion that there was error in the instruction of the court in regard to the measure of damages, and as the question may be again raised, we will now decide it. The intestate, at the time of his death, was employed in interstate commerce, and the case was, therefore, properly tried under the Federal Employers' Liability Act. With respect to damages, the court instructed the jury that the burden was on the plaintiff to satisfy the jury that the intestate would have continued to contribute to the support of his father after he arrived at the age of 21 years, and further, that he must satisfy them as to the amount of such contribution as he would have made after his maturity. This could hardly be the rule intended by Congress, as such facts would be incapable of anything like accurate or even approximate proof. They depend so much upon contingencies as to be beyond the human ken. We cannot foretell what a man will do with his estate in the future, and therefore Congress, aware of this difficulty in making proof, required that the amount of recovery should be measured by the reasonable expectation of benefit which would accrue to the parent, or a dependent, by the continuance of the life in question. We think this part of the charge, in its general scope and tendency, was not in accordance with the correct principle to be gathered from the evident meaning and purpose of the act, and we have already so decided. Here the intestate was under no obligation to support and maintain his father. 29 Cyc., 1619. What he might do for him, in that way, would be voluntary on his part—a mere gift or gratuity, prompted, it is true, by filial devotion or duty, but nevertheless a moral and not a legal obligation. *Dooley v. R. R.*, 163 N. C., 454. We said in that case, quoting from and approving the language of *Jus-*

tice Pollock in *Franklin v. R. R.*, 4 Hurl. and Norman, 511: "If, then, the damages are not to be calculated on either of these principles, nothing remains except that they should be so calculated in reference to a reasonable expectation of pecuniary benefits, as of right or otherwise, from the continuance of the life. Whether the plaintiff had any such reasonable expectation of benefit from the continuance of his son's life, and if so, to what extent, were the questions left in this case to the jury. The proper question then was left, if there was any evidence in support of the affirmative of them. We think there was. The plaintiff was old and getting infirm; the son was young, earning good wages, and apparently well disposed to assist his father, and in fact he had so assisted him to the value of 3s. 6d. a week. We do not say that it was necessary that the actual benefit should have been derived; a reasonable expectation is enough, and such reasonable expectation might well exist, though, from the father not being in need, the son had never done anything for him." Again, this Court says in the *Dooley case:* "A person entitled to the benefit of the action may recover damages for the loss of a pecuniary benefit to which he was not legally entitled, but which it is reasonably probable he would have received except for the death," citing Tiffany on Death by Wrongful Act (2 Ed.), sec. 159. Mr. Tiffany has classified the losses which may be considered in assessing the damages, and the persons entitled to be compensated therefor. The first description of loss is principally confined to a husband's loss of his wife's services, a wife's loss of her husband's support and services, a parent's loss of the services of a minor child, and a minor child's loss of the support of a parent. But the statutes do not confine the benefit of the action to husbands, wives, minor children, and parents of minor children. The second description of loss includes the loss by the beneficiary of any pecuniary benefit which he might reasonably have expected to receive during the lifetime of the deceased by gift, and also the loss of any accumulations which it is probable that the deceased would have added to his estate had he lived out his natural life, and which the beneficiary would probably have received by inheritance. He then proceeds to say: "Thus the second description of loss may be divided into (1) losses of prospective gifts, and (2) losses of prospective inheritance. The loss sustained by a husband, wife, minor child and a parent of a minor child may be of both descriptions. The loss sustained by an adult child, parent of an adult child, or collateral relative, can only be of the latter description." We approved this elucidation of the act in *Dooley's case*, in which *Justice Allen* so fully and clearly explains this new law, and cited in support of Mr. Tiffany's statement the following cases: *Greenwood v. King*, 82 Neb., 22; *Hillebrand v. Stans. Bisc. Co.*, 139 Cal., 236; *Duckman v. R. R.*, 237 Ill., 108; *R. R. v. Kindood*, 57 Texas, 498; *Hopper v. R. R.*,

155 Fed. Rep., 277. The case last cited was much like this one. The action was there brought by a father for loss by the death of his daughter, who was killed by the negligence of the defendant in that case. She had not contributed anything to her father's support, nor had she rendered any appreciable service to him. He had, on the contrary, been at considerable expense in supporting, maintaining, and educating her. *Judge Van Devanter,* then circuit judge, now a justice of the Supreme Court of the United States, said in regard to the father's right to damages: "Considering this evidence, in the light of the natural influence or promptings of filial ties, we think it would have sustained a finding that there was a reasonable expectation of substantial, though not large, pecuniary benefit to the father from a continuance of the life of the daughter," citing several cases to sustain his view. It may here be remarked that the *Dooley case* presents facts in almost exact analogy to those we are now considering, as it was an action by the father for loss sustained by the death of his son. In this case it appears that the intestate was a boy in good health, earning $1.10 per day, and was contributing regularly to the support of his father. He was sober, industrious, and of average intelligence for his age. His conduct towards his parent tended to show that he was, in mind and disposition, imbued with a proper conception of his filial duty and entertained the proper affection for his father. The evidence in this case of a reasonable expectation by the father of benefit or pecuniary aid or other advantage of gift or inheritance, if the life of his son had been spared to him, was sufficient for submission to the jury.

Before closing this opinion, we must advert to the recent case of *Irwin v. R. R.,* 164 N. C., 5, where it is said: "We held in *Dooley v. R. R.,* 163 N. C., 454, that an action may be maintained under the Federal statute in behalf of a parent when there is a reasonable expectation of pecuniary benefit from the continuance of the life of the child, although the child has not contributed to the support of the parent, and the authorities which support this principle also hold that evidence of contributions by the child to the support of the parent is material and important in determining whether such reasonable expectation exists, and in the assessment of damages which may be recovered, and if such evidence is material and competent for the parent, the defendant may prove the contrary." That case sustains our conclusion, that the instruction as to damages was erroneous and was in harmony with what is thus said in *Am. R. R. Co. v. Didricksen,* 227 U. S., 145: "The cause of action which was created in behalf of the injured employee did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages

recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss thus sustained." And the case of *R. R. v. McGinnis*, 228 U. S., 175, is to the same effect. We think that the law is unquestionably settled by those decisions, as to the measure of damages under the Federal act.

New trial.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF CHARLOTTE v. COUNTY BOARD OF EDUCATION OF MECKLENBURG COUNTY.

(Filed 19 May, 1915.)

1. Schools—Apportionment of School Funds—Private Laws—Apportionment Per Capita—Interpretation of Statutes.

Chapter 149, Public Laws 1913, is upon its face amendatory of chapter 89 of the Revisal, specifying the sections upon which it acts without reference to section 4029 therein, and as it does not purport to repeal any of the sections of said chapter 89, it is construed to leave the provisions of section 4029 in force, to the effect that the provisions of chapter 89, Revisal, shall not apply to any township, city, or town now levying a special tax for schools and operating under special laws or charter. Hence chapter 324, sec. 207, Private Laws 1907, providing for the apportionment from the public school funds of Mecklenburg County per capita for the public graded schools of the city of Charlotte, and as brought forward and explained by the Laws of 1915, is not repealed by said chapter 149, Public Laws 1913, requiring the apportionment "so as to give to each school in the county for each race the same length of school term, as nearly as may be, each year."

2. Same—Constitutional Law.

Revisal, sec. 4029, providing that chapter 89 of the Revisal shall not apply to townships, cities, or towns now levying a special tax for schools under special laws or charters, and chapter 324, sec. 207, Private Laws 1907, providing the apportionment from the county school funds to the city of Charlotte shall be per capita, do not contravene Article IX, sec. 2, of the State Constitution, providing for "a general uniform system of public schools," etc.

APPEAL by plaintiff from *Lane, J.*, at March Term, 1915, of MECKLENBURG.

Injunction proceeding, heard by *Lane, J.*, who issued a mandatory injunction directing the defendant to apportion the school fund in accordance with chapter 149 Laws of 1913, and not in accordance with the charter of the city of Charlotte, section 207, chapter 324, Private Laws 1907. The plaintiff appealed.

Tillett & Guthrie for plaintiff.

E. R. Preston, J. W. Keerans for defendant.

BROWN, J. This is an injunction proceeding brought to compel the defendant to apportion the public school funds of the county of Mecklenburg to the city of Charlotte, "per capita," as provided by the city charter (section 207, chapter 324, Private Laws 1907, page 857), and not according to "length of term," as provided by Public Laws 1913, chapter 149. This latter act prescribes: "It shall be the duty of the county board of education to distribute and apportion the school fund so as to give to each school in the county for each race the *same length of school term, as nearly as may be, each year.*"

Section 207 of the revised charter of the city of Charlotte is in these words: "That the county board of education of Mecklenburg County, in apportioning the school fund of said county, shall ascertain and determine the amount of said funds to be used each year for the public graded schools of the city of Charlotte by dividing the whole amount of school funds received by the county treasurer of Mecklenburg County, less his commissions or the part of his salary which is to be paid out of said funds, and less the amount reserved by said county board of education for the office expenses and salary of the county superintendent of education and for the per diem and mileage of the said county board of education, by the total number of children of school age in said county, as determined by the last census preceding such apportionment, and by multiplying the quotient so obtained by the total number of school children in the city of Charlotte, as determined by last school census preceding such apportionment; and the amount so ascertained and determined is to be paid by the treasurer of said Mecklenburg County to the treasurer of the public schools of the city of Charlotte, or such other official as may be legally designated to receive the same, to be used for the said public schools of said city under the control and direction of the board of school commissioners of said city of Charlotte."

Chapter 89, Revisal 1905, which contains the general school law of the State, provides (section 4029) that "The provisions of this chapter shall not apply to any township, city, or town now levying a special tax for schools and operating under special laws or charters." The city of Charlotte is now levying a special tax for its schools and is conducting its school system under its special charter above cited.

The defendant contends: "That the act of 1913, chapter 149, was intended to embrace the *general school policy in the apportionment of school funds throughout the State, and necessarily repealed by implication* section 4029 and any prior local or general statute inconsistent therewith."

We do not think this position can be maintained, in view of the language of the act of 1913. This act is on its face an amendatory law, amending certain sections of chapter 89 of the Revisal, specifying them.

It does not in any way repeal or amend section 4029, above quoted. Its title is that of an amendatory act, and is as follows: "An act to amend certain sections of chapters 81 and 89 of the Revisal of 1905 of North Carolina and certain chapters of the Public Laws of 1907, 1909, and 1911 of North Carolina, being parts of the public school law."

For the purpose of relieving the matter of any doubt, the General Assembly of 1915 enacted:

"Whereas a doubt has arisen as to whether section 207 of chapter 342 of the Private Laws of 1907 is still in force, or whether the same has been repealed by chapter 149 of the Public Laws of 1913: Now, therefore,

"The General Assembly of North Carolina do enact:

"SECTION 1. That in apportioning the school fund of the county of Mecklenburg the county board of education shall be governed in all respects by the provisions of section 207 of chapter 342 of the Private Laws of 1907."

No sufficient reason has been advanced which would justify us in holding that section 4029 of the Revisal or section 207 of the revised charter of the city is violative of the State Constitution, Art. IX, sec. 2, providing for "a general uniform system of public schools wherein tuition shall be free of charge to all children in the State between the ages of 6 and 21 years."

The various legislatures that have passed laws since the Constitution was adopted seem to have considered that a fair and just method of distributing the school fund is per capita, and numerous acts have been passed looking to this end.

Section 4029, Revisal, has been on the statute book many years, and its constitutionality has never been questioned. In pursuance of it a great many cities and towns in this State are conducting their school systems under special legislation providing for a per capita apportionment of the school fund.

We are not prepared to say that all this legislation, which has been in force so many years, is contrary to our fundamental law. In the *Greensboro school case* the per capita method of apportionment is recognized, the Court holding that "the public school fund in any county, from whatever source arising, must be distributed pro rata among the several school districts respectively, according to the number of children in each."

The Court says: "A very material part of the fund thus devoted to the support of public schools is taken from the ordinary revenue of the State, raised by taxation; but this does not imply, nor does it follow, that the fund thus raised is to be distributed to the support of schools

located in the neighborhood of those taxpayers who paid the taxes, or most thereof, but *it is to be distributed as nearly as may be per capita for the education of all the children in the State.*"

The judgment of the Superior Court is reversed, and the cause is remanded, with direction to issue a mandatory injunction commanding the defendant to apportion and distribute the school fund in accordance with the provisions of the charter of the city of Charlotte.

Reversed.

JOHN A. BOYDEN, JOHN S. HENDERSON, EXECUTOR AND TRUSTEE, ET AL. v. J. R. HAGAMAN.

(Filed 19 May, 1915.)

1. Deeds and Conveyances — Descriptions — Calls—Adjoining Tracts—Interpretation.

Where the *locus in quo* in an action of trespass involving title to lands is made to depend upon its location within the boundaries of a certain deed introduced in evidence, giving a beginning point, with further description, and then to J. H.'s line, "thence with his line to where it meets with T. H.'s line, thence with his line around to the mouth of the still-house branch, where it enters into Buffalo Creek," etc., and J. H. and T. H. are the adjoining owners at the places indicated, and there is no dispute as to the calls up to that point: *Held*, the legal method of locating the deed is to run directly from the last known point of the H. lines to the next call in the deed that was fixed and established, towit, the "mouth of the still-house branch."

2. Deeds and Conveyances—Description—Adjoining Lines—"Fixed and Established."

The doctrine requiring that lines of another tract called for in a conveyance of lands shall be fixed and established with assured precision is one that is, at times, called for where there is conflict in a deed between such calls and that by course and distance, and does not always or necessarily prevail where such conflict is not presented.

3. Same—"Run and Marked"—Interpretation.

The rule that lines of adjoining tracts called for in a conveyance of lands shall be fixed and established does not necessarily require that these lines must have been "run and marked"; but if they may be fixed and established in accordance with the recognized rules of survey and location of deeds they come within the meaning of the rule and so fill the description.

4. Deeds and Conveyances—Boundaries—Declarations—Evidence.

The admission in evidence of the declarations of a deceased owner of lands as to the location of the boundaries of his deed is not objectionable as contradicting the boundaries given in the deed, when the court has explicitly charged the jury that they could in no wise change the description as it therein appeared, and were only relevant on the question of boundary and to the extent they tended to fix the location of the lines called for.

5. Deeds and Conveyances — Declarations — Possession—Evidence—Against Interest.

The declarations of a deceased owner of lands while in possession, defining the limits of his claim, are competent as evidence; and especially so when they are made against his interest.

6. Deeds and Conveyances—Trustee—Declarations—Evidence.

The general rule that the declarations of a trustee are not competent as against the interest of the beneficiary does not apply when made in the course and performance of declarant's duties as trustee, and when he was in present possession and control of the lands, asserting his ownership under a deed.

APPEAL by plaintiff from *Harding, J.*, at November Term, 1914, of CALDWELL.

Civil action of trespass to realty, involving also an issue of title.

There were facts in evidence tending to show that, in 1880 and 1881, John A. Boyden, now deceased, acquired title to several hundred acres of land in Caldwell County, lying on both sides of Buffalo Creek, a portion of which he held in his own right under a deed from Thomas Pipes, and the remainder he held under a deed of trust from F. P. Cottrell to secure a debt due to his wife, Mary; that Cottrell lost his right of redemption by reason of adverse possession and lapse of time in favor of John A. Boyden and wife, and, on suit brought to the Superior Court of Caldwell County by Bernhardt, purchaser and assignee of Cottrell, it was so adjudged. See case of *Bernhardt v. Hagaman, John S. Henderson, trustee, and John A. Boyden, etc.*, reported in 144 N. C., p. 526. In that suit defendants also asserted title in John A. Boyden under a deed of the sheriff for taxes, etc.

It further appeared that, in December, 1889, John A. Boyden and wife, Mary, and John S. Henderson, trustee, conveyed a portion of said land, lying east of Buffalo Creek, to defendant John R. Hagaman, the deed containing descriptive terms as follows: "Situate, lying, and being in the county of Caldwell and State of North Carolina, bounded as follows, towit: Beginning at the intersection of Joe's Fork and Buffalo's Creek, and runs thence up the east bank of Buffalo's Creek to the rock cliff or bluff some 25 yards above dwelling-house, thence northeast along the highest part of the ridge to Richard Pipes' east and west line, thence east with Richard Pipes' line to John Hawkins' line, thence with his line to where it meets Thomas Hawkins' line, thence with his line around to the mouth of the still-house branch where it empties into Buffalo Creek, thence up the bank of said creek to the beginning. This deed is intended to include all the Thomas Pipes land lying east of Buffalo Creek and up along the east bank of said creek to the big rock cliff where the high foot-log used to be, and then east of a line running northeast from said cliff along the highest part of said ridge to Richard Pipes' east and west line, thence with his line and Thomas Hawkins'

line to the east bank of Buffalo Creek, and up said creek bank to the beginning. All mineral rights and privileges are excepted and reserved to the said parties of the first part and their heirs and assigns; with the right on the parties of the first part to enter upon the said lands and develop the mineral deposits and mines thereon, if there be any such. The number of acres hereby conveyed being 200, more or less."

That John R. Hagaman entered, claiming under said deed the land in controversy; cut the timber and exercised other acts of ownership.

Mary Boyden, the wife and one of the grantors in defendant's deed, having died, this suit was instituted by John A. Boyden, the other grantor, and his children, who were also the children and heirs at law of Mary Boyden, deceased, and John S. Henderson, trustee and executor, against John R. Hagaman, alleging that the deed in question only conveyed the Thomas Pipes land or a portion of it, constituting the northern part of defendant's claim, and that it did not convey any of the Cottrell land east of Buffalo Creek; this last being the land in controversy.

The defendant contended that his deed conveyed the Pipes land and all that part of the Cottrell land lying south of the Pipes land and east of Buffalo Creek. It appeared, further, that John A. Boyden died in 1912, and the suit was thereafter prosecuted by the other parties plaintiff; and further, by estimate, that the land within the boundaries as claimed by plaintiff amounted to about 162 acres.

On the issue as to title there was a verdict for defendant. Judgment pursuant to verdict, and plaintiff excepted and appealed.

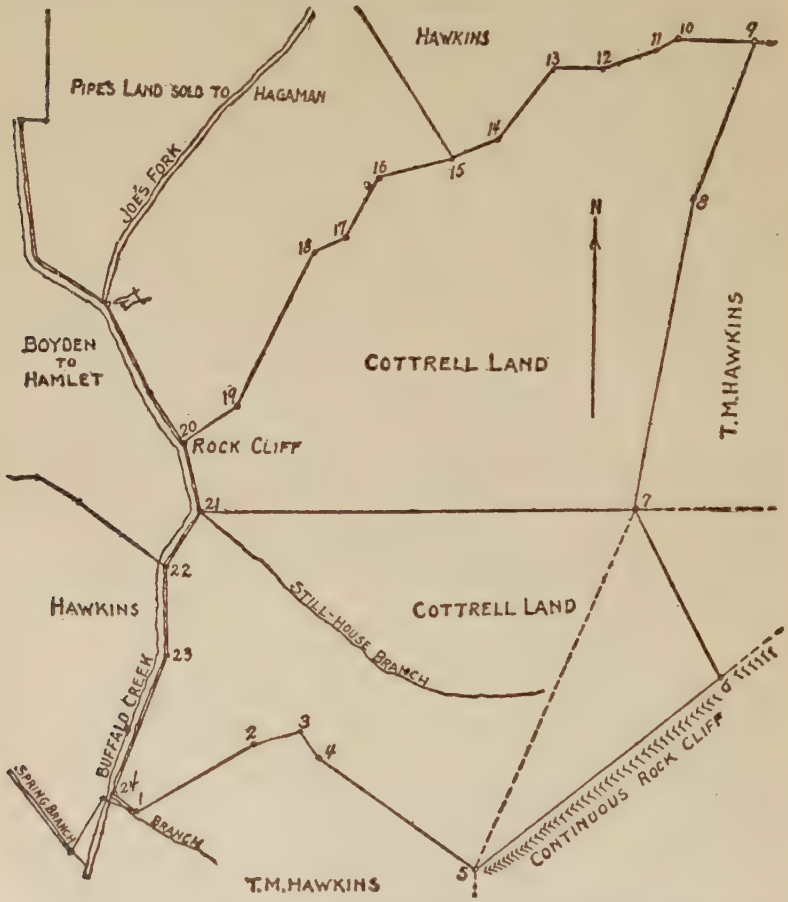
J. W. Whisnant, Edmund Jones, Council & Yount for plaintiff.
W. C. Newland, Mark Squires, T. M. Newland for defendant.

HOKE, J. We have given the case most careful consideration and find no error in the proceedings below, assuredly none that gives the plaintiffs any just ground of complaint.

The beginning corner of defendant's deed, at the junction of Joe's Fork and Buffalo Creek, was admitted, and there was no dispute between the parties as to the location of the lines around the northwestern and northern part of the land from that point to the figure 9, the northeastern corner of the land, being the point where the "John Hawkins line meets the Thomas Hawkins line," as set out in defendant's deed.

There were facts in evidence tending to show that Thomas Hawkins owned or was in possession of and claiming lands on the east of the land in question and on the south of it on both sides of Buffalo Creek, and, under the charge of the court, the jury have necessarily found that, from the figure 9 south to 8-7-6-5-4-3-2-1-24-23-22, to a point on the creek at 22, 16 poles south of the mouth of the still-house branch, there were lines of the Thomas Hawkins land, called for in defendant's deed, fixed, established, and continuous.

There were facts in evidence to support the finding, and, this being true, his Honor correctly held that the legal method of locating the deed would be to run directly from 22, the last known point of the Hawkins lines, to the next call in the deed that was fixed and established, towit, the "mouth of the still-house branch."



The ruling is in accord with our decisions applicable to the question, *McPhaul v. Gilchrist*, 29 N. C., 169; *Shultz v. Young*, 25 N. C., 385; *Hurley v. Morgan*, 18 N. C., 425; *Sandifer v. Foster*, 2 N. C., 237, and, applying the principle to the facts as accepted by the jury, justified the conclusion that the boundaries of defendant's deed were properly placed and included all of the land in controversy.

It was earnestly contended for plaintiffs that the location of the Hawkins lines, declared by the jury to be the eastern and southern boundaries

of defendant's deed, should not be allowed to stand, because the evidence as to some portions of these lines failed to show that they had ever been run or marked, and, therefore, they could not properly be considered as "fixed and established" within the meaning of the principle; but if it be conceded that the rule requiring that the lines of another's tract called for in a deed should be "fixed and established with precision" applies in this case, the authorities are to the effect that these lines need not necessarily have been "run and marked," but if they are fixed and established by the usual rules adopted and recognized in the survey and location of deeds they may come within the meaning of the rule and so fill the description. *Corn v. McCrary,* 48 N. C., 496, cited in *Lumber Co. v. Bernhardt,* 162 N. C., pp. 460, 465.

As a matter of fact, this doctrine, requiring that the lines of another tract, called for in a deed, shall be fixed and established with assured precision, is one that is, at times, called for where there is conflict in a deed between such calls and that by course and distance, and does not always or necessarily prevail in deeds of the kind presented here, where no such conflict is presented.

It was further objected for plaintiffs that the declarations of John A. Boyden were received in evidence in support of defendant's claim of ownership. In the brief of plaintiffs the objection was made to rest on the ground that this suit, not being an action to correct or reform the deed, the declarations of John A. Boyden in contradiction of the description, appearing in the deed, were inadmissible, but this position is not open to plaintiffs on the record, for the reason that his Honor, in the charge, told the jury in very explicit terms that such declarations could in no wise change the description as it appeared in the deed, and that these declarations were only relevant on the question of boundary and in so far as they tended to fix the location of the lines as called for.

In that aspect of the evidence the only declarations having appreciable significance or which could have affected the result were as to the existence and placing of the Hawkins lines on the east and south of the tract, as claimed by defendant, and these were made at a time when John A. Boyden, as trustee, was in possession and control of the property, having a survey and examination made, and with a view of executing this very deed under which defendant claims, and such declarations were competent, both as being against interest and by one in possession of property defining the limit of his claim. *Smith v. Moore,* 142 N. C., pp. 277-290; *Ellis v. Harris,* 106 N. C., 395; *Clifton v. Fort,* 98 N. C., 173; *McGee v. Blankinship,* 95 N. C., 563.

True, as to the position of the land in controversy, John A. Boyden may have been only a trustee, and the declarations of a mere trustee are not, as a general rule, competent as against the interest of the bene-

ficiary; but the position does not obtain where, as in this instance, the declarations were made in the course and performance of declarant's duties as trustee and when he was in present possession and control of the land, asserting his ownership under the deed. Chamberlain's Evidence, sec. 1327; 2 Ed. Jones on Evidence, sec. 253, p. 319.

As heretofore stated, we find no reversible error in the trial, and the judgment for defendant must be affirmed.

No error.

CALVIN CARVER v. CAROLINA, CLINCHFIELD AND OHIO RAILWAY COMPANY.

(Filed 19 May, 1915.)

1. Carriers of Passengers—Arrest of Passenger—Request of Passenger—Police Officers.

Where a conductor on a train telephones ahead to a town for officers to arrest a passenger for improper conduct, orders his arrest accordingly, and an action is brought against the railroad company for damages, the defendant is not responsible for the treatment given the plaintiff after his arrest and in which its employees took no part, the questions presented being whether the conduct of the plaintiff, while a passenger, and preceding the arrest, was such as to justify the conductor in calling upon the policeman to make it; and not for indignities the policeman may thereafter have committed on the plaintiff's person.

2. Same—Punitive Damages—Evidence.

Punitive damages are recoverable against a railroad company causing the arrest of a passenger, in the discretion of the jury, only where the passenger has been arrested by the defendant's conductor or other proper employee, and there are elements of fraud, malice, gross negligence, insult, or other cause of aggravation in the act causing the injury or humiliation.

APPEAL by defendant from *Webb, J.*, at December Term, 1914, of RUTHERFORD.

Civil action, tried upon these issues:

1. Did the defendant wrongfully and illegally injure the plaintiff, as alleged in the complaint? Answer: "Yes."

2. What actual damages, if any, is the plaintiff entitled to recover of defendant? Answer: "$500."

3. Did the defendant wantonly and maliciously injure the plaintiff, as alleged in the complaint? Answer: "Yes."

4. What exemplary damages, if any, is the plaintiff entitled to recover of defendant? Answer: "$300."

The defendant appealed.

McBrayer & McBrayer, Solomon Gallert for plaintiff.

J. J. McLaughlin, F. D. Hamrick, J. W. Pless for defendant.

BROWN, J. The evidence in this case tends to prove that the defendant ran an excursion train from Spartanburg to Altapass, on which were cars reserved for ladies. The plaintiff entered the car at Forest City with a number of companions, and, according to his own admissions, all were drinking.

The evidence tends to prove that on account of the plaintiff's drinking and open disturbance on the train, the conductor was compelled to phone to Marion for regular police officers to meet him at the station for the protection of his passengers. Two regular police officers met the train at Marion, and, after the train left, they arrested the plaintiff, who was then drinking and swearing in the presence of ladies and other passengers. The evidence tends to prove that the conductor ordered him under arrest by the regular officers and went about his affairs, leaving him in the custody of these officers, the conductor not further interfering.

The evidence tends to prove that the officers, of their own volition, as they said, for their own protection and not at the instance of the conductor, placed handcuffs on the plaintiff and moved him to the smoking apartment. Then the plaintiff became more tractable, and with the consent of the conductor, at the instance of the officers, the plaintiff was released. There was no further prosecution of the plaintiff, and he brings this suit for damages for the alleged wrongful arrest.

There was quite a number of assignments of error relating to the evidence, as well as to the charge of the court. We deem it necessary to notice only one of them.

The defendant requested his Honor to charge the jury: "If the plaintiff violated the law on defendant's train so as to justify his arrest by the conductor, and he was taken into custody by regular officers of McDowell County, the conductor, under the law, was not required to anticipate that the officers would mistreat the plaintiff. Therefore, you are charged that if plaintiff was properly arrested and turned over to proper legal officers of McDowell County, and that he was not subject to any improper indignities or suffering in the presence of the conductor, and a reasonably prudent man in the position of the conductor would not have anticipated any such mistreatment, then you would answer the first issue 'No.'"

Instead thereof, his Honor gave the following instruction: "If you find that the officers aforesaid used excessive force in putting handcuffs on the plaintiff; or if you find that it was not necessary to put handcuffs on the plaintiff at the time he was arrested to safely keep him until he was discharged; or if you find that the officers put handcuffs on him because they were irritated at him because of the language that he had used, if you find that he used profane language, or because they were mad at him, knowing at the time that it was not necessary to handcuff him to arrest him and keep him, if you find that they did know it was

not necessary to handcuff him in order to keep him, then the court charges you that a wrongful act was done the plaintiff, and it would be your duty to answer the first issue 'Yes.'"

This exception is well taken. The instruction asked for should have been given. The charge of the court placed too great a burden upon the defendant, as the conductor had no authority over the officers and could have done nothing legally to restrain their control and management of the prisoner while in their custody.

In *Brunswick and W. R. R. v. Ponder,* 60 L. R. A., 715, it is said: "If our conclusions be correct, that the conductor could assume that the arrest was a lawful one, and was under no duty to prevent it, we think the company cannot be held liable for the excessive force used. Ponder became the prisoner of the officers as soon as they laid hold of him, and before he was removed from the train. He was taken out from under the protection of the conductor by the officers of the law. He was then in the custody of the law, and, whether or not the conductor or any one else was authorized to prevent the use of unnecessary force in making the arrest, the railroad company was in this regard no longer under any duty to him as a passenger."

In *Pratt v. Brown,* 80 Tex., 608, it is held: "A railroad company whose station agent requested a policeman to arrest a disturber in a depot is not liable for the act of the officer in detaining the person arrested for an unreasonable time."

It is further contended by the defendant that the plaintiff is not entitled to recover punitive or exemplary damages assessed under the fourth issue. In the view which we take of the case, the plaintiff would not be entitled to recover punitive damages, or any other damages, because of the act of the policemen in putting handcuffs upon the plaintiff, as the evidence shows that the conductor was not responsible for that act, and did not request or authorize it.

If it should be shown upon the next trial that the conduct of the plaintiff on the train was such as to justify the conductor in calling upon the policemen and asking them to take the plaintiff in custody, then the defendant would not be liable for any damages. If the jury should find that the conduct of the plaintiff was not such as to warrant the conductor in ordering him into the custody of the officers of the law, but that the conductor acted in good faith, although mistaken, the defendant would then be liable for such actual or compensatory damages as the plaintiff may have sustained.

But if the jury should further find that the conductor wrongfully and unjustifiably ordered the arrest of the plaintiff, without necessity, and that this act of the conductor was wanton, malicious, reckless, or was done through gross negligence and disregard of the plaintiff's rights as a passenger, then punitive damage may or may not be awarded, in the

sound discretion of the jury. Punitive damages are not recoverable in actions of this character unless there is an element of fraud, malice, gross negligence, insult, or other cause of aggravation in the act causing the injury. *Holmes v. R. R.*, 94 N. C., 319.

New trial.

CITY OF KINSTON v. SECURITY TRUST COMPANY.

(Filed 24 May, 1915.)

1. Municipalities — Cities and Towns — Bond Issues—Legislative Control—Necessaries—Constitutional Law.

A legislative authorization to a municipality to issue bonds for paving and generally improving its streets; to enlarge and extend its waterworks system; to enlarge and better equip its electric light plant; to install an electric fire-alarm system, and to erect municipal buildings, is for necessary expenses, and not subject to the restrictions of our Constitution, Art. VII, sec. 7, requiring that the question of the issuance of the bonds be submitted to the vote of the people.

2. Same—Validating Acts.

Municipalities are very largely subject to legislative control as to the issuance of bonds and other matters governmental in character, and they must observe the statutory requirements, charter or otherwise, under which they act, it remaining in the power of the Legislature to remove by subsequent legislation irregularities by reason of the violation or nonobservance of requirements upon the municipality made in a previous act, when no vested rights have supervened and no mandate of the Constitution has thereby been violated.

3. Same—Immaterial Recitations—Charter Provisions—Ordinances.

Where a bond issue for necessary expenses has been submitted to and approved by the voters of a city, according to a statutory requirement, but it appears that it is in violation of the city's charter requiring that no ordinance or resolution respecting such matters be finally passed on the date of its introduction, it is within the authority of a subsequent Legislature to validate the issuance of the bonds by direct legislation, not requiring the proposition to be again submitted to the voters; nor is objection material that the validating act refers to bonds already delivered, when in fact they had only been prepared and were refused by the purchaser.

APPEAL by defendant from *Peebles, J.*, April, 1915; from LENOIR.

Civil action, heard on case agreed and by consent. The action was to recover the purchase price of a bond issue of the city of Kinston, contracted to be sold to defendant, and said defendant declined to take the bonds or pay the stipulated price, alleging that the same were invalid.

There was judgment for plaintiff, and defendant excepted and appealed.

Loftin & Dawson for plaintiff.

G. G. Moore for defendant.

HOKE, J. On the hearing it was properly made to appear that, pursuant to an act of the General Assembly, regularly passed, an election was held in the city of Kinston on 23 June, 1914, on the proposition to issue bonds to the amount of $100,000, "in order to provide funds with which to pave and generally improve the streets of the city, to enlarge and extend the water-works system, to enlarge and better equip the electric light plant, to install an electric fire-alarm system, and to erect municipal buildings," and the measure was approved by a majority of the qualified voters of the city; that the results of the election having been duly certified, on resolution of the board of aldermen, the bonds were prepared and contracted to defendants at a stipulated and lawful price, and defendants have declined to accept and pay for same, alleging that they are being issued in violation of a provision of the city charter, to the effect "That no ordinance or resolution shall be finally passed upon the date of its introduction except in case of public emergencies, and then only when requested by the mayor in writing: *Provided*, that no ordinance or resolution making a grant of any franchise or special privilege shall ever be passed as an emergency measure"; and it was admitted that the resolution of the board of aldermen, under which these bonds were prepared and bargained, and one or two other resolutions of the board bearing on the subject, all of them, had been passed the day of their introduction. It was further made to appear that this alleged defect having been suggested, the General Assembly of the State, at the regular session of 1915, passed an act to legalize and ratify "all proceedings of the city of Kinston relating to the issue of these bonds," referring, in express and definite terms, to the former statute, the election, and the purposes of the bond issue and the resolutions, etc., and providing, among other things, in section 1: "All proceedings of the city of Kinston for the issuance of said $100,000 public improvement bonds for the purposes aforesaid, including said election held 23 June, 1914, are hereby ratified and legalized, and said bonds are valid and binding obligations of said city of Kinston."

The defendants object further to the validity of the proposed bond issue because the ratifying act, in its preamble, refers to them as bonds already delivered.

Upon these, the facts chiefly relevant, we concur in the view of the judge below, that the proposed bond issue will constitute a valid indebtedness of the city, and that these defendants must be held liable for the stipulated price.

Under our decisions applicable, and on the facts in evidence, the bonds are for necessary expenses, and are not, therefore, subject to the constitutional restrictions on municipalities as to incurring indebtedness, contained in Article VII, section 7, of the Constitution. *Murphy v. Webb*, 150 N. C., 402; *Comrs. v. Webb*, 148 N. C., 120; *Fawcett v. Mount Airy*,

134 N. C., 125; *Black v. Comrs.*, 129 N. C., 121; *Vaughn v. Comrs.*, 117 N. C., 434.

The municipalities, however, in matters of this character, are very largely subject to legislative control, and as to incurring indebtedness and other questions, governmental in character, they must observe the statutory requirements under which they act.. *Ellison v. Williams*, 152 N. C., 147; *Hendersonville v. Jordan*, 150 N. C., 35; *Robinson v. Goldsboro*, 135 N. C., 382; *Wadsworth v. Concord*, 133 N. C., 587.

This last position, however, is subject to the principle, very generally recognized, that when defects and irregularities are by reason of the violation or nonobservance of statutory provisions, and unless vested rights have supervened, the objections may be removed and the measure validated by proper legislative action. *Reid v. R. R.*, 162 N. C., pp. 355-358; *Grenada County Supervisors v. Brown*, 112 U. S., pp. 261-271; *Illinois v. Ill. Cen. R. R.*, 33 Fed., pp. 721-771; *Schenck v. Jeffersonville*, 152 Ind., pp. 204-217.

In *Reid's case* the Court said: "It is well recognized that, so far as the public is concerned and when not interfering with vested rights, a legislature may ratify and make valid measures which it might have originally authorized." In *Board Supervisors, etc., v. Brown, supra*, it was held: "That a municipal subscription to the stock of a railroad company, or in aid of the construction of a road, made without authority previously conferred, may be confirmed and legalized by subsequent legislative enactment, when legislation of that character is not prohibited by the Constitution and when that which was done would have been legal had it been done under legislative sanction previously given." And, in *Schenck's case, supra*, "In the absence of constitutional restriction, the Legislature has the right to legalize the bonds of a city so long as vested rights have not intervened."

The objection that the ratifying act refers to the bonds as already delivered is without merit.

The evident purpose of the act is to cure all of the defects suggested. The language is broad enough to do it, and the reference to the bonds as having been delivered is so clearly an inadvertence that it is deserving of no consideration. *Fortune v. Comrs.*, 140 N. C., 322.

There is no error in the proceedings below, and the judgment of his Honor is, in all respects, confirmed.

Affirmed.

C. E. MILLER v. S. M. SMITH ET AL.

(Filed 24 May, 1915.)

1. Judgments—Pleadings—Default Final.

Upon failure to answer a complaint within the appointed time, alleging the indebtedness of defendant to plaintiff for goods sold and delivered from time to time within a specified period, according to an attached itemized statement, for which the defendant contracted and agreed to pay at the prices charged, and that a certain sum was due thereon after deducting all proper credits, a judgment by default final will not be set aside.

2. Judgments—Default Final—Excusable Neglect—Meritorious Defense.

Excusable neglect and a meritorious defense must be shown in order to set aside a judgment by default final properly rendered for the want of an answer.

THIS is a motion to vacate and set aside a judgment by default final, rendered at July Term, 1914, of HAYWOOD, which motion was heard by *Justice, J.*, at chambers, on 27 October, 1914, who denied the motion, and the defendant S. M. Smith appealed.

Morgan & Ward, John M. Queen for plaintiff.
J. W. Ferguson, M. Silver for defendants.

BROWN, J. The complaint alleges that the defendants are indebted to the plaintiff in the sum of $1,387.39, with interest thereon from 15 November, 1913, due for goods, wares, and merchandise sold and delivered, and for board of employees, and for goods, wares, and merchandise sold and delivered to employees on orders from time to time from 1 August, 1913, to 1 March, 1914, which sums for board, merchandise, and orders the said defendants contracted and agreed to pay at the prices charged; that there is due on said account, after deducting all credits to which the defendants are entitled, the sum of $1,387.39, with interest from 15 November, 1913. The language of this complaint is plain and unambiguous. It alleges a distinct promise to pay at the prices charged.

Upon all the authorities, the plaintiff was entitled to a judgment by default final upon the failure to answer within the time required by law. *Hartman v. Farior,* 95 N. C., 177; *Witt v. Long,* 93 N. C., 388.

In addition, his Honor not only finds facts which fail to show excusable neglect for failure to file the answer, but he also finds that the defendants have no meritorious or valid defense to the cause of action set out in the complaint. *Jeffries v. Aaron,* 120 N. C., 169.

The judgment is

Affirmed.

H. L. LAWRENCE AND WIFE v. B. F. ELLER AND WIFE.

(Filed 19 May, 1915.)

1. Landlord and Tenant—Tenant's Possession—Action of Title.

Where one has entered into possession of lands as tenant of another under an agreement of lease he may not maintain an action involving title, while in possession of the premises, against his lessor during the continuance of the lease, without first having surrendered the possession which he has acquired under the terms of his agreement.

2. Same—Exceptions—Deeds and Conveyances—Estoppel.

The restricted instances making exception to the general rule that a tenant may not sue for title of the leased premises which he has acquired under his contract of lease apply to cases where, after the renting, the title to the landlord has terminated or has been transferred either to a third person or the tenant himself; and in courts administering principles of equity the estoppel is not recognized when the tenant has been misled into recognition of his lessor's title by mistake or fraud, and under circumstances which would induce a court of equity to hold the landlord a trustee for the tenant, or other exceptions of a restrictive nature which do not apply to the consideration of this case.

3. Landlord and Tenant—Tenant's Possession—Action of Title.

If the principles of estoppel of a tenant in possession under and during the continuance of his lease do not apply to his action involving the issue of title alone, *semble* the exception to the general rule does extend to those instances where the possession and the rights growing out of or incident to it are presented or in any way affected.

4. Landlord and Tenant—Tenant's Possession—Action of Title—Cloud on Title—Gravamen of Action—Incidental Matters.

In this action by the tenant in possession of lands under his lease against his landlord under claim of acquisition of a superior title it is *Held*, that the gravamen of the action is to have the plaintiff declared the true owner, and that the plaintiff's demand to have defendant's deed removed as a cloud upon his title is only an incident and evidential, and does not affect the matter.

APPEAL by plaintiff from *Webb, J.*, at Spring Term, 1914, of AVERY.

Civil action to establish ownership and right of possession of a certain tract of land lying in Avery County.

It was admitted in the pleadings that defendants, B. F. Eller and wife, or B. F. Eller, as agent of his wife, had rented the tract of land in controversy to plaintiff for the year 1912 at the contract price of $25; that the lessee had entered into possession and occupation of the property under and by virtue of the contract and had continued such possession since that time; that in December, 1912, plaintiff had acquired a deed for the property from W. P. Eaton and wife, the original owners, and in January, 1913, had instituted the present action against the lessors, claiming to be the true owners under said deed and without having surrendered or made any offer to surrender possession acquired by them under and by virtue of the lease.

It was further alleged in the pleadings that W. P. Eaton and wife had previously, in 1906, contracted to sell the property to one D. C. Eller, who had entered under the contract of purchase, and, after committing much spoil and injury to the property, had abandoned his contract to the original owners, and plaintiff had then acquired the title by purchase and deed, and were the true owners of the property.

Plaintiff further alleged that defendants, by some fraudulent arrangement or contrivance with D. C. Eller, had obtained possession of the property, to which they had no right whatever, and while holding under such claim had made the lease under which plaintiff entered.

They alleged further, that while defendant occupied the property under their pretended claim, they had procured a deed to be made them by the sheriff of Watauga County, purporting to convey to them the right of D. C. Eller in the property, and that this was their only claim of title; and plaintiffs thereupon demand judgment that B. F. Eller and wife be declared the tenants of plaintiff, and that this pretended deed of the sheriff be declared fraudulent and void as constituting a cloud on their title.

Defendants answer, denying the allegations in impeachment of their title, and setting forth, also, that D. C. Eller bought the land originally from Eaton and wife for $1,200 to $1,300, and took a bond for title to convey same, which was duly registered in Watauga County, where the land was then situated; that some money was paid down and notes executed for the remainder, towit, two notes for $425 each and one for $200; that D. C. Eller paid the $200 note and one of the notes for $425, and, afterwards, in 1908, defendants bought the land from D. C. Eller, paying in full for his interest, and afterwards acquired the other note for $425 by purchasing the same for full value from persons to whom it had been assigned by Eaton and wife; that defendant neglected to take a written assignment from D. C. Eller for his interest in the property, but, being a man of no education, he was misled and deceived in reference thereto by D. C. Eller, but that present defendants had acquired the title to said land or the right thereto in the manner specified, and, being in possession, claiming as owners under their purchase, as stated, they had rented to plaintiff for 1912, and plaintiff, being fully aware of all the facts and that the land had been fully paid for, had entered into a pretended agreement with Eaton and wife to purchase the land and taken a deed therefor, to be paid for in case recovery could be had against these defendants, and ask judgment that defendants be declared the owners of the property and that the money paid therefor be declared a lien thereon, etc., and for general relief.

The court having intimated an opinion that plaintiffs could not maintain the present action unless and until possession had been restored to

defendants, in deference to such intimation plaintiffs submitted to a nonsuit and appealed.

T. A. Love, J. W. Ragland for plaintiff.
L. D. Love for defendants.

HOKE, J., after stating the case: It is recognized as the general rule that a tenant is not allowed to controvert the title of his landlord or set up rights adverse to such title without having first surrendered the possession acquired under and by virtue of the agreement between them.

The position does not usually obtain where, after the renting, the title of the landlord has terminated or has been transferred either to a third person or the tenant himself, for, under the doctrine as it now prevails, the loyalty required is to the title, not to the person of the landlord, and in courts administering principles of equity the estoppel is not recognized when the tenant has been misled into a recognition of his lessor's title by mistake or fraud and under circumstances which would induce a court of equity to hold the landlord a trustee for the tenant, and there are other exceptions of a restricted nature.

The general rule, however, is as stated, and, while varying at times in its application, has been everywhere recognized as sound in principle and has always been very rigidly enforced in this jurisdiction. *Campbell v. Everhardt,* 139 N. C., pp. 502-514; *Pool v. Lamb,* 128 N. C., p. 1; *Springs v. Schenck,* 99 N. C., 552; *Davis v. Davis,* 83 N. C., 71; *Farmer v. Pickens,* same volume, 550; *Wilson v. James,* 79 N. C., 349; *Abbott & Foster v. Cromartie,* 72 N. C., 292; *Callendar v. Sherman,* 27 N. C., 711; *Town v. Butterfield,* 97 Mass., 105; *Brown v. Keller,* 32 Ill., 157; *Davis v. Williams,* 130 Ala., 530; *Rodgers v. Boynton,* 57 Ala., 501; *Ward v. Ryan,* J. R., vol. 10, 76-77, p. 17; *Peyton v. Stith,* 5 Peters, 485; 2 McAdam Landlord and Tenant, sec. 421; 18 A. and E. (2 ed.), p. 414; 24 Cyc., 946.

In *Davis's case, supra, Chief Justice Smith* said: "It is well settled doctrine that one who, as tenant, gains possession of the land of another cannot resist an action for its recovery, brought after the termination of the lease, by showing a superior title in another or in himself, acquired before or after the contract. The obligation to surrender becomes absolute and indispensable. 'Honesty forbids,' says *Ruffin, C. J.,* 'that he should obtain possession with that view, or, after getting it, thus use it.' *Smart v. Smith,* 2 Dev., 258. 'Neither tenant nor any one claiming under him,' remarks *Daniel, J.,* 'can controvert the landlord's title. He cannot put another person in possession, but must deliver up the premises to his own landlord.' *Callendar v. Sherman,* 5 Ired., 711. 'If he entered as tenant, or, after entry, had become such,' is the language of *Rodman, J.,* 'he was estopped from asserting his title until he had re-

stored the possession to the plaintiff.' *Heyer v. Beatty*, 76 N. C., 292. Even a homestead right cannot be asserted in opposition to the recovery. *Abbott v. Cromartie*, 72 N. C., 292. The rule does not preclude the tenant from showing an equitable title in himself on such circumstances as under our former system would call for the interposition of a court of equity for his relief, and which relief may now be obtained in the action, as is held in *Turner v. Lowe*, 66 N. C., 413. Yet the force of the general proposition remains unimpaired, that where the simple relation of lessor or lessee exists without other complications, the latter cannot contest the title of the former. *Forsythe v. Bullock*, 74 N. C., 135. The obligation to restore a possession thus obtained, before any inquiry into the title is permitted, although springing from the contract, rests upon the foundation of good faith and honest dealing among men."

In *Farmer v. Pickens*, same volume, *Dillard, J.*, tersely states the position: "It is settled that a person accepting a lease from another is estopped during the continuance of the lease, and afterwards, until he surrenders the possession to the landlord, to dispute his title, being a rule founded on a principle of honesty which does not allow possession to be retained in violation of that faith on which it was obtained or continued."

In *Springs v. Schenck, supra*, the Court held: "A tenant cannot be heard to deny the title of his landlord, nor can he rid himself of this relation, without a complete surrender of the possession of the land."

In *Towne's case, supra:* "A tenant at will is estopped from denying his landlord's title without surrender of the leased premises or eviction by title paramount or its equivalent."

In *Brown v. Keller:* "A tenant must surrender the premises before asserting rights adverse to his landlord which he acquired after renting the premises."

And in *Davis v. Williams:*

"2. A tenant is estopped to dispute the title of his landlord, unless his landlord's title has expired or been extinguished, either by operation of law or his own act, after the creation of the tenancy (p. 58).

"3. It is only where there is a change in the condition of the landlord's title for the worse, after a tenant enters into his contract, in the absence of fraud or mistake of fact, that he is permitted to show the change in the condition of the title (p. 58).

"4. A tenant must first surrender the premises to his landlord before assuming an attitude of hostility to the title or claim of title of the latter (p. 58).

"5. An estoppel will be enforced in a court of equity as well as in a court of law (p. 59)."

A correct application of the principle declared and upheld in these

cases are in full support of his Honor's ruling, it appearing, from a perusal of the pleadings, that, without any change having taken place in the title of the lessor since the renting, the plaintiff, after having become defendant's tenant, and during his tenancy, has undertaken to acquire what he considers a superior title to that of his landlord, and, while maintaining the possession acquired under and by virtue of his lease and without surrender, he institutes the present action to have himself declared the true owner, and that defendants are in fact and truth his tenants.

It has been said that the estoppel referred to does not prevail in actions involving an issue as to title, but if such a limitation on the general rule prevails in this jurisdiction, it applies only to actions involving strictly the issue as to title, and does not extend to those where the possession and the right growing out of or incident to it are presented or in any way affected. *Peyton v. Stith,* 5 Peters, 485; Bigelow on Estoppel (6 Ed.), p. 585; 18 A. and E. (2 Ed.), p. 419.

While the action seeks also to have a deed, referred to in the pleadings, declared to be a cloud on plaintiff's title, this is only an incident and evidential. The gravamen of the action is to have plaintiff declared the true owner and that defendants are his tenants, and, under the authorities cited, such an action cannot be maintained by plaintiff unless and until he first surrenders the possession to the person from whom he rented.

There is no error, and the judgment of his Honor is

Affirmed.

WILLIAM A. WILLIAMSON v. THOMAS J. JEROME ET AL.

(Filed 19 May, 1915.)

1. Judgments—Courts—Foreign Jurisdiction—Fraud.

The fraud in procuring a judgment in another State which judgment the courts of this State will vitiate and set aside must have been of such character as to have rendered defenses unavailable to the defendant in that action, and the judgment will not be disturbed when it appears that the elements of fraud relied on to set it aside were interposed and relied on in the former action, and all matters relating thereto were embraced within the scope of the former trial and therein determined and adjudicated.

2. Same—Evidence—Nonsuit.

In an action to set aside a judgment rendered in a foreign jurisdiction for fraud, the evidence tended only to show that the funds of defendants' bank were attached in New York by the judgment creditor under allegation that the bank was a party defendant in that action; that the plaintiffs herein voluntarily went to New York, entered an appearance in the

action there, and unsuccessfully resisted judgment; that upon answer filed the action against the bank was dismissed, and that no funds of the present plaintiffs were attached in the former action. *Held*, that by entering an appearance in that action the plaintiffs voluntarily submitted themselves to the jurisdiction of the court, which they were not required to do in defense of their rights, and there being no evidence of fraud in the procurement of the judgment, a judgment of nonsuit in the present action was properly entered.

APPEAL by defendant from *Adams, J.*, at November Term, 1914, of ROWAN.

Civil action, tried upon these issues:

1. Was the judgment sued on in this case procured by the fraud of the plaintiff, as alleged in the answer? Answer: "No."

2. In what amount, if any, are the defendants T. J. Jerome, T. H. Vanderford, William F. Snider, and Tola D. Maness indebted to the plaintiff? Answer: "$5,692.93, with interest from 28 November, 1913, and $101.40, with interest from 27 March, 1914."

3. In what amount, if any, is the defendant Moses L. Jackson indebted to the plaintiff? Answer: "$5,692.93, with interest from 28 November, 1913, and $101.40, with interest from 27 March, 1914" (by consent of defendant Jackson).

From the judgment rendered the defendants appealed.

John S. Henderson for plaintiff.

A. H. Price, W. P. Bynum, T. H. Calvert for defendant.

BROWN, J. This is an action brought to recover upon a judgment obtained by the plaintiff against the defendants, Jerome, Vanderford, Snider, and Maness, in the Supreme Court of the State of New York, in New York County. Defendants pleaded that said New York judgment had been procured by fraud. Defendant Jackson was not sued in the action in New York, but by his own request became a party to this action, and judgment rendered against him in the court below, he admitting that his liability was the same as the other defendants.

The Wachovia Bank and Trust Company, a North Carolina corporation, was made a party to this action in the New York court, and attachment proceedings were sued out in said action against all the New York defendants; but no property of the individual defendants was found or attached; and no property of the bank was attached as that of the individual defendants. Upon the trial in the New York court, a separate answer having been interposed by the bank, the action was dismissed as against the bank.

The action in the New York court was brought to recover the value of services by way of commissions, which the plaintiff claimed that the defendants owed him for procuring a purchaser for certain stocks and bonds of the Salisbury and Spencer Railway Company.

The complaint alleged the employment of the plaintiff and that he procured as a purchaser W. N. Coler & Co., and that the agreed value of the services was $5,000, and that the plaintiff had not been paid. The defendants answered, admitting that the plaintiff had not been paid, but denied the employment, as well as the value of the alleged services.

The case was tried in November, 1913, in the Supreme Court, trial term, in the city of New York. The defendants were present in person as well as by attorney, and the cause was tried before a jury. Some of the defendants testified on the witness stand. The presiding justice delivered his charge to the jury and a verdict was rendered for the plaintiff. The defendants appealed the case to the Appellate Division of the Supreme Court of New York, and judgment was affirmed.

The plaintiff having brought his action in the Superior Court of Rowan County to recover on the New York judgment, the defendants set up a plea of fraud, and alleged, in substance, that the plaintiff, in order to secure jurisdiction of the defendants in New York, as the defendants allege, made the Wachovia Bank and Trust Company of Winston, N. C., a party to the action in New York, and attached large sums of money in the banks of New York belonging to the said Wachovia Bank and Trust Company, and falsely and fraudulently alleged in his complaint and affidavit of attachment that the said bank was a party to the contract by which the plaintiff was employed to sell said stocks and bonds.

The defendants also allege that the plaintiff, in order to force them to enter an appearance in said action in New York, which they did, and in order to secure jurisdiction of the defendants in that action, including the said bank, falsely and fraudulently alleged that the said bank was a party to his contract of employment, and that the money attached belonged to the defendants in that action, including these defendants.

There was no other evidence of fraud offered. His Honor instructed the jury, if they believed the evidence, to answer the first issue "No." The correctness of this ruling is the principal assignment of error.

We agree with his Honor that there is no evidence whatever of fraud practiced by the plaintiff in procuring a judgment against the defendants in the New York court. The fraud for which a judgment may be enjoined in another State must consist in the procuring of such judgment. The courts of this State will not vacate or enjoin a judgment merely based upon a cause of action, which may be vitiated by fraud, for this is a valid defense which may be interposed at the trial; and unless its interposition is prevented by the fraud of the adversary, it cannot be asserted against a judgment either foreign or domestic. Black on Judgments, sec. 919, and cases there cited.

It has been held in this State that in an action in the courts of this State on a judgment rendered in a sister State it is open to the defendant

to allege and prove fraud in the procurement of the judgment, and the term "fraud" in this connection includes all such circumstances of fraud or imposition in procuring the judgment as would induce and authorize the courts of the original forum to interfere to prevent the enforcement of an unconscionable recovery. *Motta v. Davis,* 151 N. C., 237.

Again, it is said in the same case, 153 N. C., 160: "The fraud which warrants equity in interfering with such a solemn thing as a judgment must be such as is practiced in obtaining the judgment, and which prevents the losing party from having an adversary trial of the issue."

The fact that the plaintiff saw fit to sue the bank and trust company, along with these defendants, in the New York court, is no evidence of a fraudulent purpose to decoy the defendants to that jurisdiction. The plaintiff doubtless thought he had a good cause of action against the bank and trust company. The plaintiff claimed that the whole amount of the purchase price for the stocks and bonds of the railway company, paid by Coler & Co., was received by the bank, and that in this transaction the defendant Snider and the cashier of the bank acted for the bank.

The plaintiff claimed that at every stage the bank was sanctioning the employment of the plaintiff. We fail to see how the presence or absence of the individual defendants in any way affected the action against the bank. There was no correspondence between the plaintiff and the defendants in evidence by which the defendants were decoyed to New York for the purpose of having service made upon them. It was the bank's duty to defend its own case, and if the defendants went to New York for the purpose of defending the action, it was their own voluntary act.

The fact that the bank succeeded in having the attachment set aside as to its funds is no evidence of any fraud in procuring the judgment against the individual defendants. Where a suit is brought against a nonresident defendant, and the service of process is by publication, if he voluntarily appears and defends the action the court acquires complete jurisdiction of his person, and the judgment is valid and binding alike in the State where rendered, in the domicile of the defendant, and in all other courts. Black on Judgments, sec. 908.

In order to constitute a fraudulent procurement of the defendant for the purpose of service, there must be actual fraud or trick upon the defendant. A mere request to him to go to another State and defend a suit in attachment actually pending there is not a fraudulent device. Black on Judgments, sec. 909. See, also, *Duringer v. Moschino,* 93 Ind., 495.

These defendants were not required to appear and defend the action in the New York court. No property of these individuals had been attached, for none had been found. There was no issue raised in respect

to the ownership of any property claimed by these defendants. The property attached belonged solely to the bank, and it was the bank's duty to defend its rights. If these defendants rushed to its rescue, it was their voluntary act.

There is nothing in the evidence which tends to prove that the defendants were denied any opportunity to make good such defenses as they had. The record of the trial, together with all the evidence taken in the New York court, is set out, together with the charge of the presiding judge, and the entire record shows that these defendants presented every possible defense, and that the judgment against them was affirmed by the appellate tribunal.

We agree with his Honor that there is no evidence of fraud to support the plea which the defendants have interposed.

The judgment of the Superior Court is

Affirmed.

AMERICAN NATIONAL BANK v. R. E. L. NORTHCUTT ET AL.

(Filed 12 May, 1915.)

1. Pleadings—Counterclaim.

A counterclaim which only alleges that the plaintiff is indebted to the defendant, without alleging further the nature, extent, and kind of indebtedness, and how it arose, is imperfectly pleaded, and should be disregarded.

2. Same—Banks and Banking—Bills and Notes—Parties.

Where in an action on a note brought by a bank which had taken it with other papers as collateral to a note from the local bank of deposit and original discount, an allegation is made in the answer by way of offset or counterclaim that the local bank was indebted to the defendant; that no demand for payment of its note had been made; that plaintiff had more than sufficient collateral to secure the note, etc., states no valid counterclaim as against the local bank, and the failure of the plaintiff to have made it a party defendant is immaterial.

APPEAL by defendants from *Rountree, J.*, at March Term, 1915, of ANSON.

Civil action, tried upon these issues:

1. Is the plaintiff the owner and holder in due course of the notes described in the complaint? Answer: "Yes."

2. What amount, if any, is the plaintiff entitled to recover of the defendants? Answer: "$2,000, with interest on $1,000 from 1 October, 1914, and interest on $1,000 from 1 November, 1914.

When the case came on for trial, the plaintiff moved to strike out the "further defense" set up by defendants in the answer. The motion was allowed. Defendants excepted and appealed.

Plaintiff introduced evidence sustaining the several allegations of the complaint. Defendants introduced no evidence. There were no exceptions to the evidence or to the charge of the court.

The following is the "further defense" stricken out by the court:

"The plaintiff is a nonresident corporation; that receivers have been appointed by the courts of this State for the Southern Savings Bank of Wadesboro; that said savings bank is indebted to plaintiff in the sum of $....., evidenced by its notes now held by plaintiff; that said notes have not been presented to said receivers for payment; that if the plaintiff is the holder of the notes described in the complaint, they are held by it as collateral security for the payment of the notes of the said Southern Savings Bank, given to the plaintiff, and that they are informed and believe that the plaintiff holds notes and mortgages, the property of the said Southern Savings Bank, as collateral securing said indebtedness, largely in excess of the amount due it by the said Southern Savings Bank; and that the plaintiff has collected a large sum of money from said collateral, and is endeavoring to collect more than is due it on account of the indebtedness of the said Southern Savings Bank, and to that end has instituted numerous suits in the Superior Court of Anson County for the collection of said notes and collateral security held by it, without alleging in any of the complaints filed in said actions that said notes are held by it as collateral security for said indebtedness, and without making the receivers of the said Southern Savings Bank parties to any of said actions.

"That R. E. L. Northcutt and W. N. Northcutt are stockholders of the said Southern Savings Bank, and that the defendants herein were depositors in said bank at the time of the appointment of the receivers, as aforesaid, and as such are now among the creditors of said bank.

"The defendants are informed and believe that the plaintiff had in its possession a large sum of money belonging to the said Southern Savings Bank at the time of the appointment of said receivers, which said money has not been applied to the indebtedness of said Southern Savings Bank by the plaintiff, and that the same should be applied to said indebtedness.

"That on account of the matters and things herein alleged, the defendants are informed, advised, and believe that the receivers of the said Southern Savings Bank are necessary and proper parties to this action, in order that the rights of all the parties may be properly adjudicated and protected."

Lockhart & Dunlap for plaintiff.

Robinson, Caudle & Pruette, H. H. McLendon for defendants.

BROWN, J. This action is brought to recover on two promissory notes of $1,000 each, payable to the Southern Savings Bank of Wadesboro,

N. C., and indorsed by that bank to plaintiff. The execution and indorsement of the notes by defendants are admitted.

There are no exceptions to the evidence or to the charge; therefore, the findings of the jury stand unchallenged. These entitle the plaintiff the judgment, unless the defendants have pleaded a valid set-off or counterclaim in their answer, which has been disregarded by the court.

This case is very similar to that of the *American National Bank v. Hill,* from same county, *post,* 241. Much that is said in that opinion is applicable to this appeal.

There is no allegation in the answer that the debt due plaintiff by the Southern Savings Bank, for which the note sued on and other notes have been assigned as collateral, has been fully paid by the collection of the collateral by the plaintiff.

Then, again, the answer fails to properly plead any set-off or counterclaim. The allegation is that the defendants "are stockholders in the Southern Savings Bank, and were depositors in said bank at the time of the appointment of the receivers, and as such are now among the creditors of said bank."

The answer fails to set out the amount of the deposit and in what amount the Southern Savings Bank is indebted to defendants. It may be $1 or it may be a much larger sum. If the true amount were set out, and it appeared to be inconsiderable, plaintiff could and probably would admit it and give defendants credit for it on the note and take judgment for the balance. As it is, no counterclaim is sufficiently pleaded that would be good against the Southern Savings Bank, the assignor of plaintiff.

It is well settled that the averments as to set-off or counterclaim shall be definite and certain. Vague, general, and indefinite allegations are not sufficient. The plea must be specific and must fully apprise the plaintiff of the nature and extent of the defendant's claim. 19 Enc. P. and P., 751.

In some cases it has been held that in pleading a set-off or counterclaim the same definiteness and certainty are required as in stating a cause of action in a declaration or complaint. *Bernard v. Mullott,* 1 Cal., 368; *Stockton v. Graves,* 10 Ind., 294; *Gragg v. Frye,* 32 Me., 283; and other cases cited; 19 Enc. P. and P., 751.

In this State it is held that a counterclaim which only alleges that plaintiff is indebted to the defendant, without alleging further the nature, extent, and kind of indebtedness, and how it arose, is imperfectly pleaded and ought to be disregarded. *Smith v. McGregor,* 96 N. C., 101.

In that case the Court says: "A counterclaim should be alleged with clearness and precision; its nature and the consideration supporting it;

when, how, and where it arose, should be stated with reasonable certainty. This the statute requires, and, moreover, it is necessary to just and intelligent procedure. The counterclaim is substantially the allegation of a cause of action on the part of the defendant against the plaintiff, and it ought to be set forth with the same precision as if alleged in the complaint."

The judgment of the Superior Court is

Affirmed.

M. BUCHANAN v. E. C. HEDDEN AND SARAH C. HEDDEN.

(Filed 24 May, 1915.)

1. Judgments—Title to Lands—Estoppel.

Where in an action for the recovery of land both parties claim from the same person, H., a judgment rendered in favor of plaintiff against H., involving the title to the *locus in quo*, established at least a *prima facie* title in plaintiff's favor, and will estop the defendant from asserting his title as purchaser acquired at a foreclosure sale under a mortgage subsequently executed.

2. Deeds and Conveyances—Defective Registration—Title—Connecting Links—Evidence.

A power of attorney executed in another State, not passed upon by the clerk of the court, but placed upon the registration books without his authority or order, is improperly registered (Revisal, sec. 999), and affords no evidence of title in an action to recover lands when relied upon by a party as a connecting link in his chain of title, for the statute requires that deeds or other instruments shall be properly probated by the clerk to authorize registration.

3. Deeds and Conveyances — Same Source of Title — Color — Limitation of Actions.

An unregistered deed is not color of title when the parties to an action for the recovery of land are claiming under the same source.

4. Judgments—Title to Lands—Deeds and Conveyances—Estoppel.

A judgment in an action involving the title to land has the force and effect of a deed so as to become a connecting link in the chain of title of the successful party and those claiming under him, and estops the adverse party and his privies.

APPEAL by defendants from *Justice, J.*, at October Term, 1914, of JACKSON.

Coleman C. Cowan and Manning & Kitchin for plaintiff.
J. Frank Ray and H. G. Robertson for defendants.

WALKER, J. This is a civil action for the recovery of 640 acres of land. Plaintiff introduced evidence of a grant, No. 144, from the State,

for the land in dispute, to J. F. Foster, and mesne conveyances showing that W. N. Hedden had acquired the title so granted. He then showed a judgment of the Superior Court of Jackson County, rendered in a civil action, wherein he was plaintiff and W. N. Hedden was defendant, at Spring Term, 1897, involving title to the land described in Grant No. 144, by which it was adjudged that the said W. N. Hedden was not the owner of the said land, but that the plaintiff was the owner thereof, and that a writ of possession issue to put him in possession of the same. This established that the title was in the plaintiff to this suit, so far as the parties thereto are concerned, and at least *prima facie*. *Mobley v. Griffin,* 104 N. C., 112; *Campbell v. Everhardt,* 139 N. C., 503. The defendants assert title to the land under a mortgage made by W. N. Hedden to Frank B. Mayer, a power of attorney of Frank B. Mayer to E. C. Hedden, authorizing him to sell the land under a power contained in the mortgage, a sale thereunder, and a deed by E. C. Hedden, in his own name, to Sarah C. Hedden, one of the defendants. The power of attorney, which was offered in evidence, had been acknowledged in Maryland before George Wells, clerk of the Circuit Court of Anne Arundel County, by Frank B. Mayer, who executed the letter of attorney, and a certificate of said clerk was annexed, but it was never passed upon by the clerk of the Superior Court of Jackson County, N. C., and was placed on the registry of that county without, as appears, his authority or order. The deed, therefore, was not properly registered (Revisal, sec. 999; *Lumber Co. v. Branch,* 158 N. C., 251), and was not, therefore, evidence. "Until a deed is proved in the manner prescribed by the statute, the public register has no authority to put it on his book; the probate is his warrant, and his only warrant, for doing so." *Todd v. Outlaw,* 79 N. C., 235; *Duke v. Markham,* 105 N. C., 138; *Williams v. Griffin,* 49 N. C., 31; *Burnett v. Thompson,* 48 N. C., 113; *Lambert v. Lambert,* 33 N. C., 162; *Carrier v. Hampton, ibid.,* 307. The court properly excluded the power of attorney, upon objection by the plaintiff. The deed from E. C. Hedden was not properly executed by him as attorney, and, besides, was never probated, so as to authorize its registration and introduction as evidence. Proof before a justice of the peace was not sufficient for this purpose, as it is required by the statute that the clerk of the Superior Court shall pass upon his certificate and order the deed to registration. Nothing of this kind was done. The law requires that the deed, or other instrument, shall be properly probated "before the same shall be registered." Revisal, sec. 999. The originals of the power of attorney and the deed were not produced, and we are not, therefore, informed as to whether they would show sufficient certificates of probate, or that the radical defects appearing upon the registry were mere misprisions of the register of deeds. *Strain v. Fitzgerald,* 130

N. C., 600; *Patterson v. Gallihcr,* 122 N. C., 511; *Heath v. Cotton Mills,* 115 N. C., 202. It may be seriously questioned whether proper search was made for the originals. *Greene v. Grocery Co.,* 159 N. C., 119; *Blair v. Brown,* 116 N. C., 631. No proof of their contents was made which is sufficient to cure the defects, if curable in that way. The defendants did not contend that they had been in adverse possession long enough to ripen their title without color, and as the deed under which they claimed title was not registered, and as both parties derived title from the same source, there was no color of title. *Janney v. Robbins,* 141 N. C., 406; *Gore v. McPherson,* 161 N. C., 638; *King v. McRackan,* 168 N. C., 621.

The plaintiff, we have said, had shown title to the land, at least *prima facie.* The defendant contends, though, that the judgment was not properly a connecting link in his title; but we have held that it is, and that it has the force and effect of a deed. *Finch v. Finch,* 131 N. C., 271; *Webb v. Den,* 17 How., 577; 23 Cyc., 1287, and note 42; *Keenan v. Comrs., post,* 253. As W. N. Hedden was a party to the civil action, in which the judgment was rendered, he and his privies are estopped by the judgment. *LeRoy v. Steamboat Co.,* 165 N. C., 109; *Cavenaugh v. Jarman,* 64 N. C., 372. The case of *Burns v. Stewart,* 162 N. C., 360, is more in point upon both propositions. It decides that such a judgment has the legal effect of a deed, and, therefore, of necessity, is sufficient to constitute a link in the chain of title, and, besides, that as to parties and privies it operates as an estoppel and passes the title to the successful party to the suit in which the judgment was rendered. We there said: "The effect of the judgment was to pass any title in the land, which the other parties may have had, to Stewart—at least by estoppel." And further: "The judgment in the suit of Stewart against Calloway and others vested the title in Stewart as much so as if the other parties had been required to execute deeds to him for the land. It is a solemn adjudication, after trial and investigation, that the true title is in him."

On a careful review of the whole case, we are satisfied that there was no error in the trial below.

No error.

A. L. SHUFORD v. C. D. BRADY.

(Filed 19 May, 1915.)

1. Wills—Interpretation—Life Estates—Remainders.

A will should be so construed as to effectuate the intention of the testator; and where a devise of lands is made in fee and thereafter it appears by construction of a later portion of the will that the testator only intended to devise a life estate with limitations over, that interpretation which accords with the testator's intent will be given to the instrument.

2. Same—Contingent Remainders—Defeasible Estates.

A devise of lands to a minor child, with a certain contingent limitation over in case of his death before majority, and, further, that should the devisee live and marry and have children, at his death the property shall go to his eldest living child; but should he die leaving no children, then to his wife; and it appears that the devisee has become of full age, has been married for ten years without children, it is *Held*, the limitation over to the wife constitutes a remainder in fee, defeasible upon the birth of children from the marriage; and the law presuming that children may be born of a marriage relation as long as it exists, an agreement of record "that there is no probability that any will be born" will be disregarded.

3. Wills—Contingent Remainders—Estoppel.

Under a devise of land to a son of the testator for life, then to his wife, with further contingent limitation over to the children of their marriage, upon the birth of such child or children they take directly under the will, and cannot be estopped by the deed of their parents.

APPEAL by plaintiff from *Harding, J.*, at February Term, 1915, of CATAWBA.

Controversy without action. Judgment was rendered for the defendant, and the plaintiff appealed.

Council & Yount for plaintiff.
No counsel for defendant.

BROWN, J. The following are substantially the facts set out in the case agreed:

The plaintiff contracted to sell and convey to the defendant a house and lot in the town of Conover, and tendered the defendant a deed therefor properly executed, but the defendant declined to accept the same, contending that the plaintiff could not convey a good and indefeasible title to the property. The plaintiff derives his title to the property through the will of one John Q. Seats, and this controversy hinges upon the construction of that will and arose out of the investigation of the title to this lot of land.

The material parts of the said will are as follows:

"Now, first, I give my son, Alexander Hamilton, all real estate that I may have at the time of my death, except what is otherwise directed in this my last will, and direct my executor in the following manner: All money that may be due my estate will go to pay my debts, but should that not be enough, take of the rents, as I direct my executor to rent all property that will make anything, to pay the debts. After the debts are all paid, my executor or guardian for my child, Alexander Hamilton, shall continue to rent all the property that I leave to my son, A. Hamilton, and will use the same for keeping up the property, such as painting, roofing, etc. This is to be done until my son is of proper age to take charge of the property I leave him.

"Now, further, this is my will, should it be so that my son die before he is twenty-one (21) years old, and leaving no wife or child, then this real estate shall go to Alice Lee Burkett and her heirs; but should Alice Lee Burkett not be living at that time, this real property shall go to my wife, Fannie E., and she may dispose of it as she pleases at her death.

"But further, as regards my son, should he live and marry and have children, at his death this real property shall go to his oldest child living. But should my son die leaving no children, but a wife, she shall come in full possession of this real property, and shall do with it as she pleases at her death."

It is further stated: "That Alexander Hamilton Seats is now 37 years of age and has been married for about ten years, but no children have been born to them, and the probability is that there will be none, and Mrs. Fannie Allen, formerly Mrs. Fannie Seats, is again a widow, and Alice Lee Burkett is an unmarried adult woman, and all of said parties are still living, and on 6 October, 1905, all of said parties joined in the execution of a warranty deed for the land devised under the last will and testament of the said John Q. Seats to Henry Wagner and Raymond Miller, which said deed is a link in the plaintiff's chain of title, and the land in controversy is a portion of the land devised by the last will and testament of the said John Q. Seats and a portion of the land conveyed by the devisees in the deed above referred to."

His Honor was of the opinion that upon the facts agreed the plaintiff could not convey a good and indefeasible title to the property described in the pleading, and rendered judgment against the plaintiff for the costs. In this judgment we concur.

It is true that in the first paragraph of his will the testator uses language which would confer upon his son Alexander a fee-simple estate to the property devised, but it is well settled that the intent of the testator is the object to be sought in construing a will, and this intent must be gathered from a consideration and examination of the entire instrument. *McCallum v. McCallum,* 167 N. C., 310.

This cardinal principle in the construction of wills, so as to effectuate the plainly expressed intention of the testator, has been largely extended to the construction of deeds, as well. *Triplett v. Williams,* 149 N. C., 394.

In the consideration of this deed, the interests of Alice Lee Burkett and the widow of the testator, Fannie E. Seats, have been eliminated by the fact that the son, Alexander, did not die before attaining the age of 21 years old, leaving no wife nor child.

The deed which has been tendered in this case would undoubtedly operate as a grant of whatever interest the grantors in the deed have, and it would operate as an estoppel upon all those claiming directly under them.

But there is a provision in this will which reads as follows: "But, further, as regards my son, should he live and marry and have children, at his death this real property shall go to his oldest child living. But should my son die, leaving no children, but a wife, she shall come into full possession of this real property, and do with it as she pleases at her death."

It is manifest that the testator did not intend, by the language in the first paragraph of his will, to give his son, Alexander, a fee-simple estate in the property devised, although the words used, standing alone, are sufficient for that purpose. By the later paragraph of the will the testator has limited the interest of his son to an estate for life. The limitation over to the son's wife, who is now living, constitutes a remainder in fee, defeasible upon the birth of children from the marriage.

It is true, according to the facts agreed, that no children have been born to the couple, and it is stated that there is no probability that any will be born. This is a prophecy which the law values but little. The law presumes that children may be born to a married couple as long as that relation continues to exist, it matters not how old either or both may be. In case children are born, then the estate is devised to the oldest child living at the time of Alexander Seats' death. Upon such contingency happening, the contingent remainder in fee to the wife would not vest. *Hauser v. Craft,* 134 N. C., 320; *Whitfield v. Garris,* 134 N. C., 25.

It is thus made plain that the oldest child of Alexander Seats and his wife will not take through them as heir at law, but will take, if at all, as a devisee of the testator, John Q. Seats. Therefore, the deed executed by Alexander Seats and his wife would not estop such child, if born, from asserting title to the land after its father's death.

The cases cited by the learned counsel for the plaintiff, *Cheek v. Walker,* 138 N. C., 160, and *Sessoms v. Sessoms,* 144 N. C., 121, are quite different from the language used in the instrument construed in the case under consideration, and are not authority for the contention that Alexander Seats acquired a fee simple under the terms of his father's will.

Upon the whole record, we are of opinion that the plaintiff cannot make a good and indefeasible title to the property contracted to be sold to the defendant.

The judgment of the Superior Court is

Affirmed.

JOHN HAAR, EXECUTOR, ET AL. *v.* NATHAN SCHLOSS.

(Filed 24 May, 1915.)

Wills—Devisees—Life Estates—Rule in Shelley's Case.

A devise of lands to testator's wife for life, with provision, "after the expiration of the life estate . . . I give, devise, and bequeath all of my estate, real and personal, to my heirs at law, and the heirs at law of" the wife, "to be equally divided between them, share and share alike": *Held*, no estate of inheritance passed to the wife, and there was a failure of title as to one-half of the land, and the rule in *Shelley's* case does not apply.

APPEAL by plaintiff from *O. H. Allen, J.*, at February Term, 1915, of NEW HANOVER.

Action to recover the purchase price of a certain lot of land which formerly belonged to Philip Christ.

The defendant refused to pay for the land upon the ground that the plaintiffs could not convey him a good title.

The plaintiffs are John Haar, executor of Mary Christ, and Katherine Wegermann, the only heir at law of Philip Christ.

Philip Christ died in 1895, leaving a will, in which he devised the land in controversy to his wife, Mary Christ, for life, and then provided: "After the expiration of the life estate just hereinbefore in item second of this my last will and testament, I give, devise, and bequeath all of my estate, real and personal, to my heirs at law, and the heirs at law of the said Mary Christ, to be equally divided between them, share and share alike."

Mary Christ died in 1912, leaving a will, in which she appointed the plaintiff Haar executor, and conferred upon him full power to sell said land and to execute a deed for the same. Thereafter the said Haar, executor, and the said Katherine Wegermann contracted to sell said land to the defendant, and they have tendered him a deed and have demanded payment of the purchase money, and the defendant has refused to accept the deed and to pay the purchase price, upon the ground that the plaintiffs cannot convey him a good title.

There was a judgment in favor of the defendant, and the plaintiffs excepted and appealed.

Bellamy & Bellamy for plaintiffs.
Herbert McClammy for defendant.

ALLEN, J. The will of Philip Christ passed only a life estate to the land in controversy to his wife, Mary Christ, unless the superadded words in the third item, that "After the expiration of the life estate, I give, devise, and bequeath all my estate, real and personal, to my heirs

at law and the heirs of the said Mary Christ," bring the devise within the operation of the rule in *Shelley's case.*

There might be some ground for this contention but for the additional words appearing in the item, "to be equally divided between them, share and share alike."

In *Mills v. Thorne,* 95 N. C., 364, which is affirmed in *Gilmore v. Sellars,* 145 N. C., 285, it was said that "In England, ever since the leading case of *Jepson v. Wright,* 2 Bligh, 1, it has been held that the words 'equally to be divided,' or 'share and share alike,' superadded to limitations to the heirs of the body, etc., do not prevent the application of the rule. But in this State it would seem that the superaddition of like words to the limitations to the heirs, or heirs of the body, or issue, do prevent the application of the rule"; and this has been the consistent ruling of this Court since the case of *Ward v. Jones,* 40 N. C., 400.

We are, therefore, of opinion there was no estate of inheritance in Mary Christ, and that there is therefore a failure of title as to one-half of the land in controversy.

The other question discussed in the briefs, as to whether the heirs at law of Mary Christ and of Philip Christ take *per stirpes* or *per capita,* is not now before us, and it cannot hereafter arise, if, as stated in the record, Mary Christ left one heir, there being only one heir of Philip Christ.

Affirmed.

J. B. MASON v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 24 May, 1915.)

1. Telegraphs—Valid Stipulation—Written Demand—Suit Brought—Reasonable Compliance.

The stipulation on the back of a telegram requiring that a written demand within sixty days be made on the company for damages claimed for its negligent transmission or delivery is reasonable and valid and subject to reasonable enforcement; and where action has been begun within the time stated, it is equivalent to the required notice.

2. Same—Two Messages—Demand as to One.

Where suit has been brought against a telegraph company for damages for negligence in handling two telegrams upon the same subject-matter, within the sixty days stipulated upon the message blank, sent within five days of each other, and complaint filed at the proper term of court, it is held that the terms of the stipulation have been reasonably complied with, and this is not affected by the fact that within the sixty days the plaintiff had made demand only upon the second message; and where recovery is had only upon the first one, the defendant cannot reasonably object upon the ground that it had been misled.

APPEAL by defendant from *Justice, J.,* at November Term, 1914, of CHEROKEE.

Civil action to recover damages for negligence on part of the defendant telegraph company.

There was evidence on part of plaintiff tending to show that, on 30 October, 1910, plaintiff, whose son was very ill at his home in said county, sent a telegraphic message from Nantahala, N. C., to Dr. Morrow, at Andrews, importing urgency, and same was not delivered, and by reason of such failure the doctor did not attend in response to said message. Later, on 4 November, plaintiff sent another message to the doctor, still more urgent, and it was claimed there was negligence in delivering this message, by reason of which the doctor's arrival was delayed from about 8 a. m. to 2 p. m. of same day, 4 November; that this boy was in a dying condition when the doctor arrived, and died the second day after the last message was sent.

There was a verdict for the plaintiff as to negligent failure to deliver the first message, 30 October, and for defendant as to second message, 4 November, and damages assessed at $300.

Plaintiff introduced a written notice, of date 16 December, 1910, containing claim for damages in $2,000, for negligent failure to deliver the message of 4 November, and further, the summons in the present action, issued 16 December, 1910, and complaint, regularly filed therein, at the next term of Superior Court, 4 April, 1911, claiming damages for negligence in case of both messages.

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

Dillard & Hill for plaintiff.

Alf. S. Barnard, George H. Fearons for defendant.

HOKE, J., after stating the case: Our cases on this subject are to the effect that the ordinary and usual stipulation, requiring that claims for damages, arising from the company's negligence in the transmission or delivery of a telegraphic message, shall be made in writing and within sixty days from the sending, is a reasonable one, except, perhaps, in certain instances, where there is an entire failure to deliver and they also hold that when an action for such negligence is instituted within the sixty days the giving of such notice is dispensed with, and a failure in this respect is not then available as a defense. This was fully recognized in *Sherrill v. Tel. Co.*, 109 N. C., 527, and expressly decided in the subsequent case of *Bryan v. Tel. Co.*, 133 N. C., 604.

In the present instance the message on which recovery has been had was received for transmission on 30 October, 1910. The action was instituted on 16 December following, and the case, therefore, comes directly within the principle of the decisions referred to, and we see no reason why the judgment should not be affirmed.

It is earnestly urged for defendant that not only was no written notice filed within the sixty days, but the claim that was filed made demand on an entirely different message, towit, that of 4 November, and, to apply the principle of *Bryan's case* would operate with great harshness on the company, as it has been positively misled. But, on the facts in evidence, we are not impressed with this view. Even if it was sufficiently presented, the position would not, in our opinion, justify a departure from a principle established and acted on as the law of the State for the past fifteen years and more; but, on the record, we think that no such claim can be sustained. These stipulations have been upheld because it is deemed fair and right that the company shall be notified before the witnesses may disappear and while the facts may be made available by proper inquiry. We know that Nantahala and Andrews, villages on the railroad, have no such great amount of business that the facts relevant to a message of this character are likely to escape observation, and a perusal of the testimony will show that the action was instituted six weeks after the message was sent; that a complaint, giving specific notice of the demand, was regularly filed at the first term of the Superior Court thereafter and five months from such date, and not only was the defendant not deprived of opportunity to inquire, in this instance, by lapse of time, but there is uncontradicted evidence of the doctor, the addressee of the message, to the effect that, soon after the action was instituted, the agent of defendant company presented a number of back receipts to witness, claiming that, in the pressure of business, he had failed to have them signed, and induced the doctor, by inadvertence, to sign for the message sued on, although the doctor told the witness that he would not sign a receipt for that date, as no such message had been received.

We find no reason for disturbing the results of the trial, and the judgment in plaintiff's favor must be affirmed.

No error.

WALKER, J., concurring: The defense set up is that "no written claim for damages was presented to the company within sixty days after filing the message for transmission, as required by the contract." We have held this stipulation to be a reasonable one; but it should be enforced reasonably, and not harshly to defeat a just claim. It does not apply if the suit for damages is commenced within the sixty days. *Sherrill v. Tel. Co.*, 109 N. C., 527; *Bryan v. Tel. Co.*, 133 N. C., 604. Whether those cases were properly decided is a question we need not discuss, as the condition now is that this case should be exempted from the operation of the rule established by those cases, by reason of its special facts. The object of this provision in the contract is to inform the company of its default, to the end that it may make seasonable investigation of the matter before the proof is lost by lapse of time.

The ground alleged for exempting this case from the operation of the rule, as to the suit being itself equivalent to presenting a claim, is that there were two telegrams, and there was no written claim presented for failure to deliver the one filed with the company 30 October, 1910, while there was such a claim made as to the one filed 4 November, 1910. According to the above cited cases, the suit would be notice as to both, unless, as defendant now contends, the filing of a claim as to one should prevent it from being so. It is urged that this should be so, because the conduct of plaintiff was apt to mislead the defendant. If the fact that plaintiff was in fact misled, and not merely apt to be misled, should take the cases out of the rule, it was incumbent upon the defendant to plead and prove the fact. This must be so, as if a suit is a notice of the claim, it must continue to be so, unless some valid reason is shown in the regular course of procedure why it should not be. The burden was not on the plaintiff to show why that, which this Court has said is a sufficient compliance with this stipulation, is not so, but this burden rested on the defendant; and I take it that this burden would not be adequately discharged by simple proof that two telegrams were involved, instead of one, unless it was alleged and shown that the defendant was actually misled to its prejudice, and not merely that there was a chance of its being misled. There was no allegation in the answer as to this material matter, which it is contended avoided the effect of the suit as notice, the averment being that no written notice of claim was given, as required by the contract; nor was there any issue tendered or submitted that fairly embraced it, unless it was the fourth issue, and there was no request for instructions as to this issue, but only as to the issue concerning damages, which is the fifth, and the question of notice was not germane to that issue. But apart from all this, the proof tends to show, not that the defendant was misled by the claim as to one of the messages, but, on the contrary, that it well knew of the default as to the telegram of 30 October, as its agent at Andrews asked Dr. Morrow to "sign for the message" on the delivery sheets, "so that his books would show up and make it all right for him," which the doctor agreed to do, upon the express promise of the agent that his acknowledgment of its receipt should not be dated as of 30 October, 1910, but should bear the true date, the doctor testifying that the message of 30 October was not delivered until some time after that date. Besides, the delivery sheet was still in the company's possession after the suit was brought, and itself showed the default, until the doctor "signed for the message." This proved full knowledge of the facts, on the part of the company, through the agent who handled the messages, and the possession of its own record of the facts, viz., the "delivery sheet" on which the default clearly appeared. If the *Sherrill* and *Bryan* decisions are not to be overruled—and I do

not think it necessary that they should be, in order to sustain the judgment—there is no reason for excepting this case from the operation of the rule they established.

I may add that in *Sherrill's case,* at p. 532, it was held that when the message is not delivered, the claim for damages may be filed, or the suit brought, within sixty days *after knowledge* of that fact, and "if defendant wishes to insist that plaintiff did not give notice of his claim within sixty days after knowledge of the nondelivery, he must set this up by answer." This is a case of nondelivery, and it is not alleged or found as a fact when plaintiff had notice of nondelivery.

BROWN, J., dissenting: The issues and findings of the jury are as follows:

1. Was the defendant Western Union Telegraph Company negligent in the transmission and delivery of the telegram dated 30 October, 1910, as alleged in the complaint? Answer: "Yes."

2. If so, was the plaintiff injured thereby? Answer: "Yes."

3. Was the defendant Western Union Telegraph Company negligent in the transmission and delivery of the telegram dated 4 November, 1910, as alleged in the complaint? Answer: "No."

4. If so, was the plaintiff injured thereby? Answer: "No."

5. What damage, if any, is the plaintiff entitled to recover? Answer: "$300."

It is thus seen that the jury passed on two causes of action, one based on the failure to deliver the telegram on 4 November, 1910, and the other on the failure to deliver the telegram of 30 October, 1910. It is admitted that the plaintiff filed with the defendant within the sixty days a notice in writing that he claimed damages for failure to deliver the telegram of 4 November. It is admitted that the plaintiff did not file any written claim for damages based on the telegram of 30 October, 1910. I am of opinion that this omission is fatal to a recovery on that cause of action.

It is well settled in this State that the stipulation that the company will not be liable unless the claim is presented in writing and within sixty days is not a stipulation restricting the liability of the telegraph company for negligence, but is a stipulation rather against the neglect of the plaintiff in *not making known his cause of complaint* within a reasonable time. This is held to be a most reasonable requirement, and, unless it is complied with, bars a recovery. *Sherrill v. Tel. Co.,* 109 N. C., 527; *Lytle v. Tel. Co.,* 165 N. C., 505; Jones on Telegraph and Telephone Companies, sec. 393.

It is clear from these authorities that this Court recognized the justness of this stipulation in order that the company may have notice while the transaction is fresh that there has been a default, and that such

default has resulted in damages, so that it can make an intelligent investigation to ascertain if the claim is just, and, if not just, prepare its defense. It is contended that the fact that this action was commenced within the sixty days is a full compliance with the stipulation.

It is held in *Bryan v. Tel. Co.*, 133 N. C., 604, that a summons served on a telegraph company within the time stipulated in the telegraph blanks for making claim for damages is equivalent to the presentation of the claim within that time.

It is not necessary that I should controvert what is there held, for in my opinion there is quite a distinction between that case and this. If the plaintiff had only one cause of action, based on a failure to send one telegram, or for negligence in delivering that telegram, the principle laid down in *Bryan's case* might apply. In this case the plaintiff presented to the defendant company a claim for damages in writing, based upon a failure to transmit and deliver the telegram of 4 November. That notice is dated 16 November, 1910, and specifically confines the plaintiff's demand for damages to the negligent failure to promptly deliver the telegram dated 4 November, 1910. That notice was delivered to the defendant's agent on 16 December, 1910. The summons in this action is dated 16 December, 1910, and was served the same day. The complaint was not filed until 4 April, 1911. The defendant had a right to suppose that the action was brought to recover damages, the claim for which, based on the telegram of 4 November, had that day been delivered to its agent. The defendant had no notice whatever and no right to suppose that the plaintiff was suing upon a cause of action relating to the telegram of 30 October. The fact that the claim in writing for damages had been presented to the defendant's agent on the very day that the summons was issued and served was well calculated to mislead the defendant's agent and to cause him to suppose that the cause of action sued upon was the failure to deliver the telegram of 4 November.

It is plain to me that where several messages, handled perhaps by different agents, are involved, the company acquires no information from the mere service of a summons such as is issued out of our courts from which it can determine on which message the suit is based, or make any intelligent investigation which will enable it to decide whether the claim is just, or prepare a defense to the action.

It is admitted that where a summons has been issued and no complaint filed, it is not a *lis pendens*, and that evidence is incompetent to show what the cause of action was. This is expressly held by *Mr. Justice Walker* in *Person v. Roberts*, 159 N. C., 168, in which he cites many supporting authorities.

Instead of the summons being any assistance to the defendant, it was positively misleading. When the plaintiff presented his claim for dam-

ages in writing, based on the telegram of 4 November, exclusively, the defendant had a right to suppose that if the plaintiff had any other cause of action against him, or any other claim for damages, he would have embraced that in his written demand, also.

The fact that he made claim for only one cause of action would lead the defendant to believe that the plaintiff had no other. Consequently, when the summons was served on the same day, immediately after filing the written claim, any reasonable person would have supposed that the action was brought solely for the purpose of enforcing the written demand which had been made on the same day.

AMERICAN NATIONAL BANK v. J. E. C. HILL.

(Filed 12 May, 1915.)

1. Bills and Notes—Holder—Due Course—Collateral Notes—Action.

The holder of a negotiable instrument in due course may maintain an action thereon against the maker, when properly transferred, though taken as collateral to a note given by his indorser; for the mere fact that the note was indorsed as collateral does not affect the matter of due course.

2. Pleadings—Courts—Striking Out Pleadings—Counterclaim—Demurrer.

The practice of the court in striking out the answer or other pleadings, or a part of it, is unusual in our Court, and in the case the part of the answer stricken out being the pleading, or an attempt to plead a counterclaim, the motion on appeal is treated as a demurrer *ore tenus* to it, upon the ground that it fails to state a valid counterclaim.

3. Bills and Notes—Equitable Title—Original Defenses.

Where the plaintiff in his suit to recover upon a negotiable note proves only an equitable title, it is subject to equitable defenses existing between the original parties.

4. Same—Counterclaim—Pleadings—Parties.

Where the maker of a negotiable note seeks to set up equitable defenses to its payment as against a holder who has acquired it as collateral to the note of his immediate indorser, upon the ground that the former had other collateral more than sufficient for its payment and the latter was indebted to the defendant, to sustain the counterclaim the defendant must show that his note had been paid by the sale of the other collateral or in some other manner, and his pleading of his counterclaim must allege a sum certain due by the plaintiff's indorser.

5. Bills and Notes—Pleadings—Counterclaim—Banks and Banking—Equitable Estoppel.

Where a note negotiable on its face is given by the maker and discounted at the bank by the payee, and at maturity this note is taken up by the maker at the bank by another note of his, wherein the bank is made the payee and the old note canceled, the maker may not set up as against the bank the defense that the original note was given in part payment for lands, the title to which proved defective, for if the payee had any such equity it was his duty to have informed the bank of his right at the time it received the renewal note.

6. Pleadings—Counterclaim—Vague Allegations.

The allegations of a counterclaim or set-off in the answer in this case is held to be too vague and indefinite. *Bank v. Northcutt, ante,* 225.

7. Banks and Banking—Bills and Notes—Collaterals—Excess—Corporations—Receivers—Actions.

A local bank having borrowed money from the plaintiff bank, hypothecating the note sued on and others as collateral, and since then becoming insolvent, and it is made to appear that the plaintiff has realized from the other securities of the borrowing bank more than sufficient to pay off the latter's indebtedness, without resort to the note in suit, the remedy is for the receiver of the insolvent bank to institute an action to recover the amount in excess of that due to the plaintiff.

APPEAL by defendant from *Rountree, J.,* at March Term, 1915, of ANSON.

Civil action, tried upon these issues:

1. Is the plaintiff the owner and holds in due course the notes described in the complaint? Answer: "Yes."

2. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: "$935, with interest from 12 October, 1914."

The defendant introduced no evidence. His Honor instructed the jury. There was no exception to the evidence or the charge of the court. In apt time the plaintiff moved to strike out the "further evidence" set up by the defendant in his answer. The motion was allowed, and the defendant excepted. The plaintiff introduced evidence sustaining the allegations contained in the complaint. From the judgment rendered the defendant appealed.

The only assignment of error is the granting of the said motion.

Lockhart & Dunlap for plaintiff.
H. H. McLendon for defendant.

BROWN, J. This is an action to recover upon a promissory note executed by the defendant to the Southern Savings Bank of Wadesboro, N. C., and duly indorsed to the plaintiff before maturity. The execution of the note and its nonpayment are admitted. The findings of the jury under the charge of the court, to which no exception is taken, establish the fact that the plaintiff is the owner and holder in due course of the said note.

Striking out the answer, or other pleading, or a part of it, is an unusual practice in this State, but is recognized as proper practice elsewhere. "It is often necessary," says 5 Enc. P. and P., 341, "for the court, in the administration of justice, to strike out a count," citing *Sherratt v. Webster,* 9 Jur. U. S., 629; *Chapman v. King,* 4 D. and L., 311, and other cases.

The evident purpose of the part of the answer stricken out is to set up a counterclaim or set-off against the note sued on in plaintiff's hands.

We will, therefore, treat the motion to strike out the "further answer" as a demurrer *ore tenus* to it, upon the ground that it fails to state a valid counterclaim.

It is admitted that the plaintiff bank holds the note of the defendant as collateral security for the note of the Southern Savings Bank. The jury find that the plaintiff was the holder in due course of the note sued on; that is to say, that plaintiff received it by indorsement before maturity for value and without knowledge of any infirmity.

The note is a negotiable instrument on its face, and the fact that it was indorsed to the plaintiff as collateral security for the debt of the indorser, the Southern Savings Bank, does not invalidate the position of the plaintiff that it is a holder in due course.

The plaintiff has the legal right to collect the collateral which it has thus received in due course in its own name, and can maintain an action thereon against the maker. *Bank v. Oil Co.*, 157 N. C., 302.

It is true that where, in an action on a note, the plaintiff proves only an equitable title thereto, the defendant, maker of the note, cannot properly be cut off from matters of defense existing between the defendant, maker and indorsee or payee. *Tyson v. Joyner*, 139 N. C., 70.

In this case the defendant fails to allege that the debt due to the plaintiff by the Southern Savings Bank has been paid and discharged by the collection of the collateral or in any other way. There is no allegation in the answer that the payment of the note in this case will overpay the indebtedness due by the said Savings Bank to the plaintiff, and that, therefore, the defendant would have a right to set up the alleged counterclaim.

If the defendant had alleged in his answer that the plaintiff held a large amount of collateral as security for the note executed to it by the Savings Bank, and that the plaintiff's note had been fully paid by collections from his collateral or otherwise, then a very different case would have been presented for the consideration of the Court. As it is, nothing of that sort appears in the answer.

A further and conclusive reason supporting the ruling of the court below is that the answer does not allege any set-off or counterclaim. It simply alleges that the note sued on was given to the Savings Bank as a renewal for one previously given to the Dixie Development Company and indorsed to the Savings Bank and originally given for the purchase money of land; that the Dixie Company cannot make good title to said land for the reason that there was a mortgage on the same in favor of one Little, and another mortgage on the same in favor of the said Savings Bank.

When the defendant executed the note sued on to the Savings Bank it was made payable to the Savings Bank, and, evidently, the note to the

Dixie Company, executed by the defendant, was discharged and canceled. The renewal note to the Savings Bank was a contract between the defendant and the Savings Bank, and if the defendant had any equity, set-off, or counterclaim against the Dixie Company, it was his duty to make it known to the Savings Bank at the time when the Savings Bank discharged the note indorsed to it by the Dixie Company and took the defendant's note payable directly to itself instead.

Again, the allegations of the answer attempting to set up a counterclaim or set-off are too vague, indefinite, and uncertain upon which to raise an issue. It is well settled that the averments as to set-off or counterclaim must be definite and certain. Vague, general, and indefinite allegations are not sufficient. The counterclaim is substantially the allegation of a cause of action on the part of a defendant against the plaintiff, and it ought to be set forth with the same precision and certainty. *Smith v. McGregor*, 96 N. C., 101. See, also, a case similar to this and from the same county, at this term, the *American National Bank v. Northcutt, ante*, 225.

If it be a fact, which is not alleged in the answer, that after the collection of all the collateral in its hands, the plaintiff should have in its possession funds in excess of the amount due by the Savings Bank to it, the proper course is for the receivers of the Savings Bank to institute action against the plaintiff, if it fails to make a proper accounting and pay over the funds in its hands in excess of the amount due it.

The judgment of the Superior Court is

Affirmed.

SAMUEL GODFREY v. ATLANTIC HORSE INSURANCE COMPANY.

(Filed 24 February, 1915.)

Insurance — Principal and Agent — General Agent — Waiver — Implied Authority.

A general agent of an insurance company impliedly has authority to waive a stipulation in a policy of insurance, in this case, on a horse, and his receipt of the premium on the policy with knowledge that the local agent had waived the stipulation would be a waiver by the general agent, and binding on the insurer.

APPEAL by defendant from *Carter, J.*, at November Term, 1914, of PASQUOTANK.

Action upon a contract of insurance upon a horse. The defendant relied upon the breach of certain conditions in the policy as a defense, and the plaintiff contended that these conditions had been waived by the defendant. Evidence was introduced supporting the contentions of the parties.

The jury rendered the following verdict:

1. Did Mendenhall, general agent, authorize Winder, agent, to waive the provisions in the policy, as alleged? Answer: "Yes."

2. Did Winder waive the provisions of said policy, as alleged? Answer: "Yes."

3. If so, did the general agent receive the premiums with knowledge of such waiver? Answer: "Yes."

4. After the horse became unwell, did the plaintiff Godfrey act with due diligence? Answer: "Yes."

5. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: "$75, with interest."

Judgment was entered in favor of the plaintiff, and the defendant excepted and appealed.

Ward & Thompson for plaintiff.
I. M. Meekins for defendant.

PER CURIAM. We are of opinion that the evidence introduced by the plaintiff to show authority in the local agent to waive the provisions in the policy was competent; but if not, the finding upon the third issue is conclusive against the defendant.

It is well settled that the general agent of an insurance company has authority to waive stipulations in a policy (*Gwaltney v. Assurance Society,* 132 N. C., 929; *Hardy v. Ins. Co.,* 154 N. C., 438), and if, as found by the jury, the agent received the premiums from the plaintiff with knowledge that the local agent had waived the stipulation, this would be a waiver by the general agent.

No error.

T. H. SHEPARD v. NORFOLK SOUTHERN RAILROAD.

(Filed 17 February, 1915.)

Negligence—Automobiles—Speed Regulations—Proximate Cause.

The mere fact that the speed of an automobile exceeded that allowed by chapter 107, Laws 1913, at the time of collision with a railroad train at a public crossing, does not of itself prevent a recovery by the owner, where there is evidence of negligence on the part of the railroad, because it would, among other things, withdraw the question of proximate cause from the jury.

APPEAL by defendant from *Carter, J.,* at December Term, 1914, of CHOWAN.

Civil action for injury to plaintiff's automobile at a railroad crossing. On the three ordinary issues in actions of this character, negligence, con-

tributory negligence, and damages, there was verdict for plaintiff. Judgment on verdict, and defendant excepted and appealed.

Pruden & Pruden for plaintiff.
Small, MacLean, Bragaw & Rodman for defendant.

PER CURIAM. On a former appeal in this cause, reported in 166 N. C., 539, from a judgment for defendant, a new trial was ordered. The facts will there sufficiently appear. The case has been tried below in accordance with the principles announced in that opinion, and we find no reason for disturbing the result.

It is urged for error that, inasmuch as plaintiff himself testified that his automobile was going 8 or 10 miles an hour, he is barred of recovery as a conclusion of law, by reason of the public statute of North Carolina regulating speed of automobiles, chapter 107, Laws 1913, and more especially by the last clause of section 15 of the act, in terms as follows: "Upon approaching an intersecting highway, a bridge, dam, sharp curve, or steep descent, and also in traversing such intersecting highway, bridge, dam, curve, or descent, a person operating a motor vehicle shall have it under control and operate it at such speed, not to exceed 7 miles an hour, having regard to the traffic then on such highways and the safety of the public."

The position, in our opinion, however, cannot be sustained, because, among other things, it withdraws the question of proximate cause from the jury, and, on the facts in evidence, this would be in contravention of our decisions on the subject, notably, *McNeill v. R. R.*, 167 N. C., 390; *Clark v. Wright*, *ibid.*, 64, and *Buchanan v. Lumber Co.*, 168 N. C., 40.

There is no error, and the judgment is affirmed.

No error.

T. M. PEARCE ET ALS. v. W. W. S. WATERS.

(Filed 24 February, 1915.)

Trials—Issues of Fact—Appeal and Error.

The controversy in this case was over the title to a tract of land, depending upon the location of a certain boundary line, with evidence tending to support the contention of both parties, and it is held that the issue presented exclusively a question of fact, submitted under a correct charge of the court, and no error is found on appeal.

APPEAL by defendants from *Long, J.*, at December Term, 1914, of WASHINGTON.

Civil action, tried upon these issues:

1. Were the plaintiffs, at the time of beginning this action, the owners

of the land in controversy represented on the Ange map from red 1 to red 2 and back to 1? Answer: "Yes."

2. If so, did the defendant trespass on said land? Answer: "Yes."

3. If so, what damages are plaintiffs entitled to recover? Answer: "One penny."

From the judgment rendered the defendants appealed.

Ward & Grimes for plaintiff.

A. O. Gaylord, Small, MacLean, Bragaw & Rodman for defendant.

PER CURIAM. This is an action of trespass to determine the title to a small piece of gallberry, bear-grass land, represented on the Ange official map by a small triangle between red 1 and at the circle of white G and red 2, or white D and red 5 or red 3 and back to red 1. The title of the land depends solely upon the location of one line of the John Gray Blount 9,000-acre grant, the material calls of which are as follows: "Thence north 60 west 600 poles to the highland on which the road passes and to the east of Milady Hole Swamp; thence with the highland the various courses thereof, to Moore and Jackson's corner, near the mouth of Flat Swamp, on the south side thereof."

The plaintiffs contend that the line north 60 west 600 poles runs to A on the map, although in order to run to A the polage must be extended 190 poles in order to reach the highland on which the road passes to the east of Milady Hole Swamp.

The defendants contend that the line north 60 west 600 poles stops at the end of the polage by operation of law, and that the judge should have so charged the jury to find the location to be at the end of the polage, and to run the next call of the grant along the eastern end of the islands to G.

The defendant further contends that there is evidence of a road and highland near where the polage gives out. We have examined carefully the evidence and the charge of the court, and we find that there is evidence tending to prove that there were high lands and a road, which answers the contentions of the plaintiff; and also high land and a road near where the polage gives out, which answers the contentions of the defendant. We think his Honor very properly left the question to be determined by the jury as to which high lands and road east of Milady Hole Swamp were intended to meet the description in the grant.

His Honor submitted the matter to the jury under the well settled decisions of this Court, and in a charge free from error. The matter seems to be one almost exclusively of fact, and we find nothing in the record which necessitates another trial.

No error.

PATTIE E. HOUSE ET AL. v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 10 March, 1915.)

Telegraphs—Delivery to Company—Principal and Agent—Evidence.

In order to hold a telegraph company liable in damages for the non-delivery of a telegram, it is necessary to show that it was received for the company by some one of its agents having express or implied authority to do so, which does not appear in this case, the evidence tending only to show that the one to whom the message was delivered, from a train en route passing a station, was known to the person delivering it to have had some connection with a railroad company or the defendant telegraph company at some other location and time, and had been in the defendant's office, and that he receipted and received the money for the transmission of the message, saying it would immediately be sent.

APPEAL by defendant from *Connor, J.*, at July Special Term of HERTFORD.

Action to recover damages for negligence in the transmission and delivery of a telegram.

The defendant denied that it received the telegram.

The following is the evidence relied on by the plaintiff to prove a delivery to the defendant:

J. J. House testified as follows: "Dr. Green wrote the telegram after we left Ahoskie, and we tried to send it at every station until we got to Whaley, Virginia. It was early in the morning and the stations were not open. When we reached Whaley, Dr. Green gave the telegram to J. H. Ellen; he came to the car, bareheaded; I don't know where he came from; I had known Ellen seven or eight months. When I saw Ellen before, he was at Aulander. I saw him in the telegraph office.

"Ellen received the telegram and Dr. Green paid him for it. Dr. Green read the message to J. H. Ellen, and said to him: (That the message was important; that we wanted it sent at once; that my wife's life depended upon this.) The message was taken by Ellen. We paid Ellen 25 cents.

"I was present when the message was delivered to J. H. Ellen. Mr. Brinkley, the baggage master in charge of the car in which we were riding when we reached Whaley, called Ellen. Dr. Green handed the message to Ellen. I am quite sure I heard all that passed between the three—that is, Brinkley, Dr. Green, and Ellen—while they were together."

Pattie E. House testified: "I heard Dr. Green read the message to some one. I was in the baggage car. I remember to whom the message was addressed. Dr. Green told the person to send the message at once; that delay would probably be the cause of my death. I cannot say that any one replied that he understood the message."

J. N. Vann testified as follows: "I have known J. H. Ellen three or four years. I knew him in 1911. I think I was in Whaley in fall of 1911. I have seen Ellen at Whaley. I don't know that I was there in December, 1911. I think I saw Ellen in 1911."

Q. "What was he doing when you saw him?"

A. "He was in the employment of the Atlantic Coast Line Railroad Company. I never saw him receive or send messages. The Western Union Telegraph Company's office and the Atlantic Coast Line Railroad Company's office at Whaley are all in one. I frequently saw J. H. Ellen around there. I cannot say what he was doing when the trains passed, but I saw him frequently in the office. He came from the office—a little barred- off place—to the train. I have seen him at Aulander. Ellen was employed by the A. C. L., to the best of my knowledge and belief."

Dr. Green testified: "I wrote a telegram to Dr. Payne. We tried to send it at the first station we found open. I don't remember the words of the telegram. I gave it to Mr. Brinkley, the baggage master. It was early in the morning and only two stations were open. Whaley was the first. I was in the baggage car with Mrs. House, Mr. House, and Mr. Brinkley. I first gave the telegram to Mr. Brinkley. When we got to Whaley a man came out to the door. He had papers in his hand. The man took the telegram and signed a paper. That is the man (pointing to a man in the courtroom). Mr. Brinkley said: 'I have a telegram for you,' and asked him to read it. I took the telegram and read it to him. He was standing at the car door. Brinkley understood the message and told the man to send it off. I paid the man 25 cents. He accepted 25 cents and said he would send off the telegram as soon as he could.

"I have stated all that I remember that occurred between J. H. Ellen and myself. I read the telegram to him and paid him 25 cents for same. He said he would send it at once. I wrote it between Ahoskie and Tunis, I think; I am not sure whether the train was running or not when I wrote it.

"Ellen did not come into the car. He was standing at the car door, and I was in the door, with Mr. Brinkley standing by me. I don't know how far the telegraph office is from the train; I suppose some 20 feet. I did not carry the message to the office, because I did not have time. I don't think I told him it was for Mrs. House."

At the conclusion of the evidence the defendant moved for judgment of nonsuit, which was denied, and the defendant excepted.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

D. C. Barnes and E. T. Snipes for plaintiff.

George H. Fearons, George Cowper, and W. D. Boone for defendant.

PER CURIAM. There is no evidence that Ellen, to whom the telegram was delivered at Whaley, was the agent of the defendant company, and therefore there is an entire failure of proof on the material fact of a delivery of the telegram to the defendant company.

The only evidence tending to connect Ellen with the telegraph company is that of Mr. House, who says that he had seen Ellen in the telegraph office at Aulander, while, on the other hand, a witness for the plaintiff, Mr. Vann, testifies that Ellen was in the employment of the railroad company.

We are, therefore, of opinion that the motion for judgment of nonsuit ought to have been allowed.

Reversed.

SARAH ANN MERRITT v. F. W. DICK ET AL.

(Filed 22 April, 1915.)

1. Appeal and Error—Assignments of Error—Rules of the Supreme Court—Motions—Appeal Dismissed.

Assignments of error which only group the exceptions, as, "Group 1 includes the first assignment," etc., give no indication of the error complained of, and are far from being a compliance with the rule, and will be dismissed under Rule 19, subsec. 2. The Court on this appeal, for reasons stated, refused to grant appellant's motion to consider additional assignments filed.

2. Pleadings—Amendments—Court's Discretion—Appeal and Error.

Error assigned on appeal to the order of the trial judge permitting, in his discretion, a defendant to file an amended answer will not be considered on appeal when there is nothing to indicate that he had abused this discretionary power.

APPEAL by plaintiff from *Allen, J.*, at October Term, 1914, of NEW HANOVER.

Civil action, tried upon these issues:

1. Is the plaintiff as tenant in common the owner in fee of the lands in dispute and described in the complaint, and entitled to the possession thereof? Answer: "No."

2. Is the plaintiff's claim barred by the statute of limitations? Answer: .....

3. What damages, if any, is plaintiff entitled to recover of the defendant, Answer: .....

From the judgment rendered plaintiff appealed.

K. C. Sidbury T. C. Wooten for plaintiff.

Davis & Davis, Bellamy & Bellamy for defendant.

PER CURIAM. The defendants move to dismiss this action under Rule 19, subsection 2, for a failure to properly assign error. The plaintiff

assigned a number of additional assignments of error when the case was called for argument, and asked the court to consider them, which motion was taken under advisement.

In the record proper the original assignments of error are as follows: Group 1 includes the first assignment; Group 2 includes 3, 4, 5, 8, 10, 11, and 15; Group 3 includes 12, 13, and 14; Group 4 includes No. 16; Group 5, No. 17; Group 6, Nos. 22 to 40, inclusive.

It is manifest that these assignments are far from being a compliance with the rule. They give no indication whatever of the errors complained of, and would require an almost microscopical examination of the record to locate them.

We feel constrained to deny the motion, as it would require the filing of an entire new brief upon the part of the defendant. Nevertheless, we have looked informally into the additional assignments of error, filed at the time of the argument, and we think that they are without merit.

A controversy in respect to the location of the grant seems to be one almost exclusively of fact, and seems to have been properly submitted to the jury. The only error properly assigned in the original record is to the action of his Honor in permitting the defendant to file an amended answer. This was purely discretionary upon the part of the judge, and there is nothing in the record indicating that such discretion was abused.

No error.

VIRGINIA MASSEY, ADMINISTRATRIX OF P. H. MASSEY, DECEASED, v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 22 April, 1915.)

1. Courts—Continuance of Case—Discretionary Powers—Appeal and Error.
The continuance of a case is within the discretion of the trial judge, and will not be reviewed on appeal when no abuse thereof is made to appear.

2. Instructions—Trials—Negligence—Wrongful Death—Measure of Damages.
The instruction of the court to the jury upon the measure of damages recoverable for the wrongful death of the plaintiff's intestate is approved under *Ward v. R. R.*, 161 N. C., 186, and that line of cases.

APPEAL by defendant from *Rountree, J.*, at September Term, 1914, of DURHAM.

Civil action, tried upon these issues:

1. Is the plaintiff the duly qualified administratrix of Patrick H. Massey? Answer: "Yes."

2. Was the plaintiff's intestate killed by the negligence of defendant's lessee, as alleged in the complaint? Answer: "Yes."

3. If so, did plaintiff's intestate by negligence on his part contribute to his death? Answer: "No."

4. What damages, if any, is the plaintiff entitled to recover? Answer: "$9,750."

From the judgment rendered defendant appealed.

Bryant & Brogden for plaintiff.
Guthrie & Guthrie, J. L. Morehead, W. G. Bramham for defendant.

PER CURIAM. The negligence of the defendant and its liability for damages is admitted. The only assignments of error relate to the refusal of his Honor to continue the case at the instance of the defendant, and to his Honor's charge upon the question of damages. It is well settled that the continuance of the cause is within the sound discretion of the judge. We find nothing in this record denoting any abuse of such discretion. We have examined the charge of the court on the question of damages, and find it to be a correct expression of the law, as laid down by this Court in a number of cases. *Burton v. R. R.*, 82 N. C., 507; *Benton v. R. R.*, 122 N. C., 1009; *Mendenhall v. R. R.*, 123 N. C., 278; *Watson v. R. R.*, 133 N. C., 190; *Ward v. R. R.*, 161 N. C., 186.

No error.

THOMAS J. KEENAN v. COMMISSIONERS OF NEW HANOVER COUNTY AND I. B. RHODES.

(Filed 22 April, 1915.)

Judgment—Strangers—Estoppel—Divisional Line of Lands—Chain of Title—Evidence.

A judgment roll is incompetent as evidence to estop in a separate action one who was not a party from claiming a different divisional line of lands than therein established, though held, in this case, as competent to be shown as a mere link in the plaintiff's chain of title.

Ricaud & Jones and E. K. Bryan for plaintiff.
J. O. Carr and J. D. Bellamy for Rhodes.
Kenan & Stacy for commissioners.

PER CURIAM. This is a petition to rehear the above cause, reported 167 N. C., 357. On the trial the court permitted the introduction of a judgment roll in the case of Thomas J. Keenan v. City of Wilmington and Louisa G. Wright.

We hold that the said judgment roll was not competent evidence for the purpose of locating the division line between the plaintiff's land and

that of the defendant Rhodes, it appearing that Rhodes was not a party to the said action and not bound by the judgment.

Such judgment is not competent for the purpose of estopping Rhodes in locating the division line between him and the plaintiff. If it is to be used as a mere link in the plaintiff's chain of title, it is competent for that purpose.

The petition to rehear is

Dismissed.

W. A. BURRIS v. J. N. BURRIS.

(Filed 28 April, 1915.)

Appeal and Error—Exceptions Withdrawn—Judgments—Presumptions.

When the appellant withdraws his exceptions to the evidence, and none are taken to the judge's charge to the jury, it will be assumed by the Supreme Court that the findings of the jury are correct; and under the issues answered in this case the judgment of the trial court thereon, alone excepted to, is affirmed.

APPEAL by interpleader from *Lane, J.*, at November Term, 1914, of ANSON.

Civil action. There was a judgment against the interpleader, J. A. Parker, for the sum of $208.34, from which he appealed.

The following are the issues and findings of the jury:

1. Was the note and mortgage transferred by Harrell Bros. Company to J. A. Parker, as alleged? Answer: "Yes."

2. What amount, if anything, is the defendant J. N. Burris due J. A. Parker? Answer: "$15.83 and interest from 27 January, 1912."

3. What was the value of the property sold under mortgage by J. A. Parker? Answer: "$300."

4. What amount, if any, is due plaintiff on his note and mortgage given by J. N. Burris? Answer: "$194.36, with interest from 28 December, 1910."

5. Was the property bought by J. A. Parker at the said sale? Answer: "Yes."

H. H. McLendon, I. R. Burleson for plaintiff.

Walter E. Brock, Robinson, Caudle & Pruette for interpleader.

PER CURIAM. In the brief of the appellant the several exceptions relating to the admissibility of evidence are withdrawn. The only assignment of error is as follows: "The court erred in rendering judgment as set out in the record." We must assume, in the absence of any excep-

tions to the evidence, or to the charge of the judge, that the findings of the jury are correct. That being so, we are of opinion that such findings fully warrant the judgment rendered.

No error.

HELEN MOWERY v. M. W. MOWERY.

(Filed 28 April, 1915.)

Appeal and Error—Objections and Exceptions—Evidence—Judgments.

When on appeal from judgment allowing alimony *pendente lite* in an action for divorce *a mensa*, etc., the judgment alone is excepted to, it will not raise the question of the sufficiency of supporting affidavits or the findings thereon, it being required that appellant assign error by pointing out the particular finding he claims is not supported by the evidence.

APPEAL by defendant from order of *Rountree, J.*, made 6 March, 1915; from ANSON.

Civil action for divorce *a mensa et thoro*, heard on motion of the plaintiff for alimony *pendente lite*. From the order and judgment rendered the defendant appealed.

Robinson, Caudle & Pruette for plaintiff.

H. H. McLendon, John W. Gulledge for defendant.

PER CURIAM. The only assignment of error set out in the record is in these words: "The defendant assigned as error the judgment rendered herein." It is contended by the defendant that the affidavits and evidence offered upon the motion for alimony are insufficient to support the findings of fact made by the judge.

No such assignment of error is set out in the record. If the appellant desired to present such a contention, he should have assigned his error by pointing out the particular finding of fact which is not supported by the evidence.

Nevertheless, we have examined the affidavits, and find that his Honor's findings were fully sustained, and they warrant the order allowing alimony to the plaintiff *pendente lite*.

Affirmed.

ELLA G. MONTGOMERY, ADMINISTRATRIX, v. CAROLINA AND NORTHWESTERN RAILWAY COMPANY.

(Filed 5 May, 1915.)

Railroads—Trials—Instructions—Appeal and Error—Harmless Error.

In this action to recover of a railroad company damages for the negligent killing of the plaintiff's intestate, an employee, the verdict was in plaintiff's favor, and exception to the charge is taken upon the small amount of the damages awarded, contended to have resulted by the jury's diminishing the amount in considering the question of contributory negligence. Construing the charge as a whole, it appears that only the defendant's negligence was considered, and no reversible error is found.

Squires & Whisnant, Thomas Newland, M. N. Harshaw, and Murray Allen for plaintiff.

J. H. Marion and W. C. Newland for defendant.

PER CURIAM. We have examined the record carefully, and considered the able argument and learned brief of plaintiff's counsel submitted to us, and find no error in the trial of the case. The jury answered the issue, as to negligence, in favor of the plaintiff, and the exceptions relate, therefore, to the issue as to damages, which were assessed at $1,000, the plaintiff contending that the amount is too small and that the verdict in this respect was influenced by an erroneous charge of the court. If considered in detached portions, there may be some ground for the exception, but it should be taken and construed in its entirety, as we have so often held. *Aman v. Lumber Co.*, 160 N. C., 374; *S. v. Exum*, 138 N. C., 599; *Kornegay v. R. R.*, 154 N. C., 389; *McNeill v. R. R.*, 167 N. C., 390.

His Honor distinctly told the jury that if the injury and death of intestate were caused by a violation of the safety appliance act of Congress, they should not consider the intestate's contributory negligence, if there was any, in diminution of the damages. We are induced to believe, after a careful review of the charge and the evidence, that the jury found that the intestate's death was caused by a violation of the safety appliance act, and for some reason satisfactory to themselves they agreed upon this verdict, though small it may be, or not as full as plaintiff thinks it should have been. If it was so, the remedy for the correction of the alleged error was by motion, in the court below, to set aside the verdict.

The charge as to the measure of damages, we think, was at least substantially correct and a sufficient compliance with the law. It would seem that in one or two respects the charge was liberal to the plaintiff.

No error.

FRANK ANTHONY v. J. EDGAR POAG.

(Filed 5 May, 1915.)

Appeal and Error—Instructions—Negligence—Harmless Error.

In an action to recover for an alleged negligent injury to plaintiff, while driving on the streets of a town, by the defendant while running an automobile, the plaintiff on cross-examination testified that defendant gave him $5 in money, carried him to his home and appeared to be solicitous of him. The court refused to charge, at defendant's request, this evidence should not be considered on the issue of negligence, and it is held that no prejudice to defendant has been shown, and the refusal of the request was not reversible error.

APPEAL by defendant from *Shaw, J.*, at December Term, 1914, of GASTON.

Civil action to recover for negligent injury.

There were facts in evidence tending to show that, in May, 1911, plaintiff, driving a one-horse wagon in the town of Cherryville, was injured by reason of negligence on the part of defendant, operating an automobile on the streets of the town.

There was evidence on part of defendant that he was not negligent, and further that plaintiff's injury was properly attributable to his own negligence in the way he endeavored to alight from his wagon at the time of the occurrence.

On the three ordinary issues, in actions of this character, there was verdict for plaintiff. Judgment, and defendant excepted and appealed.

David P. Dellinger for plaintiff.
Mangum & Woltz for defendant.

PER CURIAM. The issue as to defendant's liability for plaintiff's injury was largely one of fact, and, the jury having accepted plaintiff's version of the occurrence, an actionable wrong is established, and we find no sufficient reason for disturbing the result.

There were facts in evidence tending to show that, shortly after the occurrence, defendant had shown concern for plaintiff's condition; had left $5 at a drug store for him and taken steps to have him presently removed to his (plaintiff's) home, and it was chiefly urged for error that the court failed to charge, as requested by defendant, that this conduct should not be considered on the issue of negligence.

While the prayer may, as a general rule and on this record, embody a correct general proposition, we do not think the action of the court concerning it should be held for reversible error, for the reason that we are utterly unable to see that the evidence was used to defendant's prejudice or that it in any way affected the result.

As a matter of fact, the kindness of the defendant in procuring a physician for plaintiff was brought out on cross-examination of plaintiff by defendant's counsel, and the considerate conduct of his client was no doubt used to full advantage in the discussion of the issue. It was for this reason, probably, the court ignored the prayer for instructions, and, in doing so, we are unable to see that prejudicial error was committed. After giving the matter very careful consideration, we are of opinion that the judgment should be affirmed, and it is so ordered.

No error.

THE OBSERVER COMPANY v. REMEDY SALES CORPORATION.

(Filed 5 May, 1915.)

1. Principal and Agent—Evidence of Agency—Ratification.

The statement by the secretary and treasurer of a corporation that an account rendered to it was correct is some evidence of the authorized act of one having made the contract to bind the company thereto as its agent.

2. Principal and Agent—Evidence of Agency—Books.

Where a corporation is sought to be bound as principal for the acts of another, it is not reversible error for the trial judge to refuse to strike out the testimony of a witness, on the question of agency, that it was understood that the one acting was the authorized agent, when the corporation books, introduced in evidence, discloses that he was such agent at the time.

3. Principal and Agent—Appeal and Error—Harmless Error.

A corporation sought to be bound by the acts of one purporting to be its agent, it is not reversible error for the judge to charge the jury that a person may act as the agent for half a dozen corporations, and, apart from the fact of its being true in this case, it could not have affected the verdict.

APPEAL by defendant from *Shaw, J.*, at November Term, 1914, of MECKLENBURG.

Action to recover the amount of an account for advertising.

There was a judgment in favor of the plaintiff, and the defendant excepted and appealed.

Thaddeus A. Adams for plaintiff.
Flowers & Jones for defendant.

PER CURIAM. We have carefully examined the exceptions relied on by the defendant and find no reversible error.

The admission of the correctness of the account, when it was presented to the defendant, by Mr. Powers, who was then its secretary, treasurer,

and general manager, was sufficient to carry the case to the jury, and there was other evidence tending to sustain the plaintiff's claim.

The letter of Guy V. Barnes was competent, but its effect was dependent upon the evidence introduced to show his authority to bind the defendant or of ratification by the defendant.

The statement by Powers, that he understood that Barnes was manager of the defendant company prior to the time he became manager, was objectionable as hearsay; but no harm came to the defendant from the refusal to strike out this evidence, because the books of the company were admitted in evidence, and they showed that Barnes had been manager, and the date of his election.

The statement of his Honor, during the argument of the defendant for a judgment of nonsuit, that one man could represent one-half dozen different corporations, was true, and in any event could not have affected the verdict.

No error.

I. S. ROBINSON v. ED. D. HUFFSTETLER.

(Filed 5 May, 1915.)

Appeal and Error—Matters of Fact.

This action seeking to recover damages for wrongfully detaining the plaintiff's mules, involves largely matters of fact, with instructions following the rulings on a former appeal, and no error is found.

APPEAL by defendant from *Shaw, J.*, at September Term, 1914, of GASTON.

Civil action, brought to recover two mules alleged to have been wrongfully detained by the defendant, and damages alleged to have been sustained by the plaintiff. The following are the issues submitted:

1. Is the plaintiff the owner and entitled to the possession of the two black mare mules, as alleged in the complaint? Answer: "Yes."

2. What is the value of said mules? Answer: "$450."

3. What damage, if any, is the plaintiff entitled to recover of the defendant by reason of the wrongful detention of the said mules? Answer: "None."

Mason & Mason, George W. Wilson for plaintiff.
Mangum & Woltz, A. C. Jones for defendant.

PER CURIAM. This case was before this Court at Spring Term, 1914, and is reported in 165 N. C., 459. In the opinion of *Mr. Justice Allen* the law applicable to the facts of this case is fully discussed, and in the

last trial the court below has carefully followed the opinion of this Court. The matters submitted to the jury were largely questions of fact, and have been determined by the jury under a charge free from error.

We have examined the several assignments of error, and find them to be without merit.

No error.

JOHN SETZER v. M. L. PLANK AND FORREST FLOYD, TRADING AS PLANK & FLOYD.

(Filed 12 May, 1915.)

Negligence.

This action to recover damages for a personal injury was tried under well settled principles relating to defendant's negligence under the evidence and correct instructions, and no error is found.

APPEAL by defendants from *Adams, J.*, at January Term, 1915, of CLEVELAND.

Civil action, tried upon these issues:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: "No."

3. Did the plaintiff assume the risk of being injured in the manner in which he was injured, as alleged in the answer? Answer: "No."

4. What damage, if any, is plaintiff entitled to recover? Answer: "$100."

The defendants appealed.

No counsel for plaintiff.
Ryburn & Hoey for defendant.

PER CURIAM. We have examined the record in this case and the several exceptions. We find them to be without merit. His Honor followed the well settled principles of the law of negligence in his instructions to the jury in this case.

No error.

SOUTHERN SPRUCE COMPANY v. A. H. HAYES AND J. J. ENLOE.

(Filed 24 May, 1915.)

Reference—Report—Confirmation by Court—Pro Forma—Appeal and Error.
Where the referee's findings of fact are supported by evidence and approved by the court, they are not reviewable on appeal; and where it appears that the court refers *seriatim* to the findings of fact and conclusions of law of the referee and adopts them, it is not open to objection that he has done so *pro forma*, for he is not required to state his reasons therefor.

APPEAL by plaintiff from judgment rendered by *Justice, J.*, at chambers, 30 December, 1914; from SWAIN.

Action of trespass for damages for the wrongful cutting of timber upon certain lands described in the pleadings. The defendants not only denied the plaintiff's title, but pleaded a counterclaim for damages sustained by them by reason of the wrongful issuing of an injunction. The cause was pending in the Superior Court of Swain County and at March Term, 1914, was referred to a referee by consent. The referee made his report and the plaintiff filed exceptions. These exceptions were heard by *Justice, J.*, at chambers, 30 December, 1914, who confirmed the report of the referee and entered judgment in favor of the defendant against the plaintiff for the sum of $500 damages and the costs of the action, including the fees of the stenographer. The plaintiff appealed.

Lucky & Andrews, Frye, Gantt & Frye for plaintiff.
Felix E. Alley, Thurman Leatherwood, Morgan & Ward for defendant.

PER CURIAM. It was very earnestly contended upon the argument that the learned judge did not review the findings of fact made by the referee, but adopted them *pro forma* without examination. We find nothing in the record to justify such contention. The judge of the Superior Court is not obliged to write out his reasons for adopting the findings of fact made by a referee.

In this case the fourteen findings of fact seem to have been considered by the judge and affirmed and adopted by him *seriatim*. The ten conclusions of law reached by the referee are also specifically numbered and affirmed by the judge. This case involves purely questions of fact, and the facts being found, the conclusions of law naturally follow.

The main contention was as to the location of a maple corner, represented on the official map by the black figure "6" and the red figure "6"; the plaintiff contending that it was correctly located at the black figure "6" and the defendants contending that it was located at the red figure "6," which last place was designated on the map as the maple at the Broom place. The referee found the facts as contended for by the defendants, and there is abundant evidence to sustain such findings.

As said in another case, *McCullers v. Cheatham,* 163 N. C., 63: "The misfortune of the defendants (the plaintiff in the case at bar) in this case is that the referee has found all the essential facts against them, and when these findings were reviewed and approved by the judge, upon consideration of the report and exceptions, there being evidence to warrant them, we are precluded from changing the report in this respect, but must decide the case upon the findings of fact as made by the referee and approved by the court. . . . We will not review the referee's findings of fact, which are settled, upon a consideration of the evidence, and approved by the judge, when exceptions are filed thereto, if there is some evidence to support them."

Affirmed.

L. W. BRADLEY v. CAROLINA COAL AND ICE COMPANY.

(Filed 24 May, 1915.)

Master and Servant—Duty of Master—Safe Appliances—Defects—Evidence—Nonsuit.

In an action to recover damages for a personal injury alleged to have been inflicted on an employee by the employer in his negligent failure to provide proper appliances, etc., it is necessary for the plaintiff to show the defective condition, that it was the proximate cause of the injury, and that the defendant knew thereof or should have discovered and repaired it in proper time; and the evidence in this case is held insufficient where the driver of a coal delivery wagon used a plank as a seat, upon failure of the employer to provide one; that owing to a defect the sides of the wagon spread apart and caused the injury complained of.

APPEAL by plaintiff from *Webb, J.,* at February Term, 1914, of BUNCOMBE.

Civil action. At the conclusion of the plaintiff's evidence the defendant moved for judgment as of nonsuit, which motion was allowed. The plaintiff excepted and appealed.

Zeb. F. Curtis for plaintiff.
Alfred S. Barnard for defendant.

PER CURIAM. The evidence is to the effect that the plaintiff, at the time of his injuries, was a driver of one of the coal wagons of the defendant, and was engaged in delivering coal about 4 miles from the plant of defendant. Defendant furnished plaintiff with a two-horse wagon and team of mules, but failed to provide him with a seat upon which to sit while in the discharge of his duties. Plaintiff selected a piece of timber from the yard of defendant with which to make a seat for the wagon furnished by defendant, and while driving along a rough street in the

city of Asheville, with a load of coal to be delivered at Grove Park Inn, a small piece of wire which was used for holding the "sideboards" of said wagon together, and upon which "sideboards" plaintiff had placed the piece of timber for a seat, suddenly broke, allowing his seat to fall by the spreading of "sideboards" and thereby throwing plaintiff against the ground, whereby he sustained injuries.

It is well settled by numerous decisions of this Court that where a servant seeks to recover damages because of defects in the instrumentalities furnished him by the master, he must allege and prove, first, that there was a defective condition; second, that the defective condition was the proximate cause of his injury, and, third, that the defendant knew of the defective condition or was guilty of negligence in not discovering and repairing the same. *Hudson v. R. R.*, 104 N. C., 491; *Shaw v. Mfg. Co.*, 143 N. C., 131. The evidence fails to prove these necessary facts.

There was no evidence that the defendant knew or should have anticipated this accident, or could have foreseen that the accident might occur, and before there would be a recovery on the part of the plaintiff it was necessary for him to show a breach of duty on the part of the defendant—some act or omission producing the breach culpable in itself and such as a reasonably careful man would foresee might be productive of injury; for one is not liable for an injury which he could not foresee. *Carter v. Lumber Co.*, 129 N. C., 203; *Raeford v. R. R.*, 130 N. C., 599.

As was said by this Court in *House v. R. R.*, 152 N. C., 397: "The rule requiring the employer of labor to provide for his employees a reasonably safe place to work and appliances reasonably safe and suitable for the work in which they are engaged obtains in case of machinery more or less complicated and more especially driven by mechanical power, and does not apply to ordinary conditions requiring no special care, preparation, or prevision, where the defects are readily observable and where there was no good reason to suppose that the injury complained of would result."

We think the words of *Mr. Justice Cook*, in *Martin v. Mfg. Co.*, 128 N. C., 264, are peculiarly applicable to the facts in this case: "Surely, it cannot be seriously contended that every employer is responsible for injuries occurring from improperly tempered axes, hoes, scythes, trace-chains, lap-links, bridle-bits, etc., the imperfection of which could not be known till used; or for defective whiffle-trees, axe-helves, hoe-helves, hand-spikes, plow-lines, and such like (the defects of which would be first discovered by the party using them), unless the employer is shown to have knowledge of such defects.

"If such be the rules of law, then the contentment of the farmer must give place to anxiety and dread lest injury, resulting to a servant from a splintered hoe-helve, a hand-spike, defective bridle-bit, whiffle-tree, or plow-line, *et id simile*, may at any time occur, and sweep from him his

farm and belongings in compensation of the damages done. To the same experience would the contractor expect to be subjected should a defective nail, while being driven by one of his carpenters, break and do injury. To which doctrine we cannot subscribe."

Affirmed.

S. M. SLOAN ET AL. v. EQUITABLE LIFE ASSURANCE SOCIETY.

(Filed 12 May, 1915.)

Appeal and Error—Case on Appeal—Interpretation of Statutes—Motions—Case Stricken Out—Judgments.

A paper-writing purporting to be a case on appeal will be stricken out and the judgment below affirmed when not sufficiently made out in compliance with Revisal, sec. 591; and a mere outline of the case incorporating instructions to the clerk to fill in certain portions of the evidence stenographically taken and transcribed, the charge of the court, etc., is not a sufficient compliance with the statute, it being the duty of the appellant to make out his case and fully perfect it before serving it upon the appellee, and no part of the duty of the clerk to do so.

APPEAL by plaintiff from *Long, J.*, at June Term, 1914, of BURKE.

Spainhour & Mull and S. J. Ervin for plaintiff.
Avery & Ervin and W. B. Council for defendant.

PER CURIAM. The defendant moves the Court to strike out the statement of case on appeal and to affirm the judgment upon the face of the record. The motion is allowed. The statement of the case on appeal is in no sense in compliance with the rules of this Court or with the provisions of the Revisal, sec. 591.

The statement served upon the appellee purports to be nothing more than a mere skeleton, and may be illustrated by the following extract:

This was a civil action, tried at June Term, 1914, of Burke Superior Court, before his Honor, B. F. Long, judge, and a jury. (The clerk will here copy the first paragraph of the notes of the stenographer as shown by the first page of the said notes and the first six (6) lines of second page of the said notes.)

The defendant offered the following evidence, viz.:

(The clerk will here copy the evidence offered by the defendant as shown by the stenographer's notes, including any and all objections and exceptions consecutively, and number the same consecutively from one (1) to four (4), inclusive.)

Here the defendant closed the evidence, and the plaintiffs also closed.

The court instructed the jury as follows, viz.:

(The clerk will here copy the judge's charge.)

The statute, as well as the rules of this Court, require a plain and concise statement of the case on appeal, and that the evidence shall be stated in narrative form, so far as possible, and the exceptions shall be numbered and the assignments of error properly grouped and set up.

It is not the duty of the clerk of the court to make up a case on appeal for the appellant, nor to fill up the blank spaces. It is the duty of the appellant to make up his case and fully perfect it before it is served upon the appellee.

Judgment affirmed.

T. B. SHEPHERD v. R. L. TAYLOR ET AL.

(Filed 24 May, 1915.)

1. Contracts—Commissions—Deeds and Conveyances—Probate—Seals—Evidence.

In an action to recover commissions for obtaining title to a certain copper mine, wherein the defendant denies the agreement and refuses to accept the conveyance, it is competent for the plaintiff to put in evidence the deed to show performance on his part, though the required seal of the probate officer had not been attached, this being confined to the purpose for which it was admitted, and not as evidence of title; it being permissible for the seal of the officer to be affixed upon defendant's accepting the deed.

2. Trials—Evidence—Impeachment.

Held, in this case, testimony of a certain witness was admissible for the purposes of impeachment.

APPEAL by defendant from *Webb, J.*, at August Term, 1914, of MACON.

Action to recover the sum of $2,500, alleged to be due for services in procuring options or other contracts under which the defendants would be able to obtain the title to the Angel Copper Mine.

The defendants denied the contract as alleged by the plaintiff.

There was a verdict and judgment for the plaintiff, and the defendants appealed.

T. J. Johnston, H. G. Robertson, J. Frank Ray, and M. Silver for plaintiff.

G. F. James and J. Scroop Styles for defendants.

PER CURIAM. The controversy between the plaintiff and the defendants is one of fact as to the terms of the contract, which has been settled by the jury in favor of the plaintiff, and we find no error committed upon the trial.

Three exceptions taken by the defendants, one being raised by an objection to evidence and two by prayers for instructions, are to the

validity of the deed which was tendered to the defendants for the copper mine, on account of the fact that the notary public before whom the proof as to the execution of the deed was made failed to affix his notarial seal.

The deed was not offered as a link in a chain of title, but as evidence that the plaintiff had performed his contract; nor did the defendants refuse to accept it because of the absence of the seal, but upon the ground that they had not entered into a contract which compelled them to pay the plaintiff for his services.

The execution of the deed was not denied, and as the action was not one to recover land, the seal could have been affixed at any time if the defendants had agreed to accept it.

The plaintiff offered evidence fully sustaining the allegations in his complaint, and the motion for judgment of nonsuit could not therefore have been allowed.

The questions asked the witness Taylor, upon his examination, were competent as impeaching, and his Honor only admitted the evidence for that purpose.

No error.

F. C. HUFFMAN ET AL. v. GAITHER LUMBER COMPANY ET AL.

(Filed 12 May, 1915.)

1. Bills and Notes — Indorsement of Credit — Ambiguity — Open Accounts — Evidence.

In an action upon a note and an open account presenting the question of whether an indorsement on the note, received on "the above" a certain sum, referred to the payment of the open account, with the balance as a credit upon the note, it is *Held*, that the words of the indorsement, "the above," were ambiguous of meaning, and permitted evidence, in plaintiff's behalf, that the open account was attached to the note at the time of the indorsement of credit, and that the indorsement referred to it.

2. Appeal and Error—Evidence—Harmless Error.

Incompetent declarations admitted in evidence as to the correctness of items of an account in controversy are harmless when the items referred to are not disputed.

3. Evidence—Unresponsive Answers—Motions.

Where the witness answers a competent question and testifies further as to incompetent matters, the remedy of the complaining party is to move to strike from the answer the improper evidence.

APPEAL by defendant from *Harding, J.*, at December Term, 1914, of BURKE.

Action to recover a balance alleged to be due on three notes of $400 each, executed by the Gaither Lumber Company, the payment of which was assumed by the defendant Morrison, president of said company.

The questions in controversy between the parties were:

1. Whether the Gaither Lumber Company was indebted to the plaintiff in the sum of $214.12, in addition to the three notes.

2. Whether the payment of $370.30 on 25 October, 1909, should be credited on one of said notes, or whether a part thereof should be applied in satisfaction of the amount due on the open account and the balance upon the note.

The jury returned the following verdict:

1. Was the entry on the four months note for $400, dated 20 October, 1909, as follows, "Received on the above $370.30, 25 October, 1909," made at the same time and as the same transaction as the words appearing thereon, "Less open account, $214.12, being credit of $156.18 on the note"? Answer: "Yes."

2. Were the words, "Less open account, $214.12, being credit of $156.18," placed on the note after the words, "Received on the above $370.30, 25 October, 1909," as a different transaction? Answer: "No."

3. In what amount was the defendant Gaither Lumber Company indebted to plaintiff by open account at the time the entry of $370.30 was made on the note? Answer: "$214.12."

4. Is plaintiff's cause of action barred by the three years statute of limitations? Answer: "No."

5. Is the defendant Eugene Morrison indebted to the plaintiff, and if so, in what amount? Answer: "$250, with interest from 10 October, 1912."

6. Is the defendant the Gaither Lumber Company indebted to the plaintiff, and if so, in what amount? Answer: "$250."

There was a judgment in favor of the plaintiff, and the defendant Morrison appealed, assigning the following errors:

1. To the ruling of the court permitting the witness F. O. Huffman to testify that an entry of credit on the back of a $400 note in the following words, "Received on the above $370.30," meant it was received on the entire account of the Gaither Lumber Company.

2. To the ruling of the court in permitting the witness F. O. Huffman to testify to the declaration of Mr. Gaither that there was no dispute about the amount of lumber shipped by the Wells Lumber Company on the order of the Gaither Lumber Company, and that the amount for the same was honest and just.

3. To the ruling of the court denying defendant's motion for judgment of nonsuit at the close of the evidence.

John T. Perkins for plaintiff.

S. J. Ervin for defendant.

PER CURIAM. We have carefully examined the record, and find no sufficient reason for disturbing the verdict and judgment of the Superior Court.

The words in the indorsement of the credit on the note, "the above," are ambiguous, and it was competent for the witness to testify, in explanation thereof, that the whole account against the Gaither Lumber Company, amounting to $1,414.12, was attached to the note.

The objection to the declarations of Gaither, manager of the Gaither Lumber Company, apparently made in 1910, would be tenable, but it appears that the witness was only asked as to statements made by him with reference to the items in the account of 26 March, 3 April, and 5 April, 1909, and that these items were not in dispute, because they were embraced in two notes of 18 May, 1909, in the amounts of $367.09 and $370.30.

If the answer of the witness went beyond the question it was the duty of the defendant to move to strike it out.

As the execution of the notes was not denied, and the real dispute was as to the application of a payment, the motion to nonsuit was properly denied.

No error.

ALLEN D. IVIE v. D. F. KING.

(Filed 24 May, 1915.)

Slander — Justification — Evidence — Punitive Damages—Burden of Proof—Good Faith—Express Malice.

Where in an action for slander the defendant pleads justification, but fails to introduce evidence of the truth of the libelous matter or that his plea was made in good faith, the issue of his good faith is not presented; for the burden of proof of such matters is upon the defendant; and in this case the charge of the court was correct that the plea of justification unproved or unsupported by the evidence could be considered by them upon the question of aggravation under the issue of punitive damages, having charged that such damages could not be awarded unless express malice should be found.

PETITION by defendant to rehear; appeal from *Devin, J.*, from ROCKINGHAM.

W. P. Bynum, H. R. Scott, P. W. Glidewell, Thomas S. Beall, Manly, Hendren & Womble, and A. W. Dunn for plaintiff.

Manning & Kitchin for defendant.

CLARK, C. J. This is a petition by defendant to rehear this case, reported, *Ivie v. King,* 167 N. C., 174. The order to docket the petition for rehearing was restricted to the second ground of the petition—the question of punitive damages. Rule 53 of this Court, 164 N. C., 556. It is, therefore, unnecessary to consider matters arising on the first and second issues.

The defendant, as authorized by Revisal, 502, pleaded justification, as well as matters in defense. The opinion of this Court, 167 N. C., at p. 179, is as follows: "Exceptions 16 and 17 were to instructions that on the question of punitive damages the jury could consider in aggravation of damages that the defendant had pleaded justification in his answer and that he had failed to prove that the plaintiff was guilty of the matters which the defendant had charged in his answer. The court had already instructed the jury that punitive damages could not be awarded unless they found that the defendant was actuated by express malice. If that was so found, the court told them that in assessing the damages they could consider that the defendant, not content with the publication sued on, had answered, pleading its truth, thus making it a part of the court records." The petition asserts that this is error, because the court below should have told the jury "that a plea of justification interposed *bona fide* for the lawful purpose of defending an action is not an aggravation, and that unsuccessful justification can only be considered aggravation when interposed for the wrongful purpose of repeating the original slander." And further, that an instruction, such as those excepted to, which fail to require the jury to find bad faith in interposing the plea, is error.

In Newell on Slander and Libel, secs. 430 and 431, it is shown that the question whether the plea of justification is unsupported by evidence is an aggravation is a matter in regard to which the decisions are conflicting, but the author thought that the better rule would be that the jury should decide in each case whether the justification was interposed in good faith or not.

In *Upton v. Hume,* (Oregon) 41 Am. St., 864, it was held that the mere failure to make out justification does not aggravate damages, if the jury found that the defendant was free of malice and had good reason to believe that the libel he published was true.

In this case the court charged that the jury could not award punitive damages unless they found that the defendant was actuated by express malice. On the trial the defendant did not introduce any evidence to prove the truth of his charges. It was the duty of the defendant, in such case, to disclose in the evidence facts and circumstances tending to show that his plea was interposed in good faith, and it was not the duty of the plaintiff to negative this proposition.

If on the trial the defendant had introduced evidence to prove the truth of his publication, and further that his plea in justification was interposed in good faith, then the question whether such defense was made in good faith or not should have been submitted to the jury. But in the absence of evidence that the plea of justification was interposed in good faith, and more especially when there was no evidence of the truth of the publication, the issue of good faith was not presented.

If the plea was interposed in good faith, that was a matter of defense and within the knowledge of the defendant. It devolved on him to introduce evidence to that effect and to ask an instruction upon that phase of the case. This he did not do, and we cannot see that he has suffered any prejudice.

Petition dismissed.

STATE v. RANSOM ETHERIDGE.

(Filed 17 February, 1915.)

Criminal Law—Master and Servant—Tenant or Cropper—Interpretation of Statutes.

One who is a tenant or cropper of another is not his servant, within the meaning of Revisal, sec. 3365, making it an indictable offense to entice a servant to leave his master.

APPEAL by defendant from *Ferguson, J.*, at September Term, 1914, of EDGECOMBE.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

G. M. T. Fountain & Son for defendant.

WALKER, J. The defendants were indicted, under Revisal, sec. 3365, for enticing one Frank Battle, a servant, to leave his master, who, it is alleged, was J. R. Bunting, the prosecutor. It will be necessary to consider only one exception of the defendants, who were convicted below, and appealed. They contend that the evidence showed that Frank Battle was not a servant, but either a tenant or a cropper, and if either, they are not indictable, even if it is true that they had induced him to leave his alleged employer. As we are of the opinion that the position is well taken, that Frank Battle was not a servant, and that defendants, therefore, were not indictable for enticing him from the service of J. R. Bunting, they are entitled to a dismissal, even if their other exceptions are not valid. The facts are substantially like those in *S. v. Hoover,* 107 N. C., 795, where the present *Chief Justice* says: "The contract, as testified to by the prosecutor, was as follows: 'Jackson was to cultivate certain of the prosecutor's land, amounting to about 8 or 9 acres, for the year 1890, and pay him as rental the sum of $33, or one 400-pound bale of cotton, with the understanding that Jackson was to work for the prosecutor, whenever he needed Jackson and he (Jackson) could leave his own crop, at 50 cents a day.' We think the relation of master and servant did not exist, for the reason that Jackson was not in the employment of the prosecutor. The relation between them was that of landlord

and tenant. One of the terms or stipulations of the renting was that, in addition to the rent paid, Jackson, whenever at leisure, if called upon by the landlord, should work for him at 50 cents a day. It has been held that where A. employs B. to labor for him for one year at $20 per month, and gives him the use of a dwelling during that term, B.'s occupancy of the dwelling is that of a servant, and not as a tenant, and if he quits A.'s service, or is discharged, A. may enter and forcibly eject him. Wood's Master and Servant, sec. 153, and cases there cited. The reason is that the contract is that of hiring, and the use of the house is a part of the hire, or an incident of the contract. *E converso,* here the contract is that of renting, and the promise by the tenant to do labor when at leisure, if it is wanted by the landlord, is a mere incident of the contract of renting. The court below erred, therefore, in instructing the jury that 'the contract, as sworn to by the prosecutor, gave him the right to demand the services of Jackson every day if he chose to, and the man who took him away was guilty of violating the statute.' "

The statute itself, Revisal, secs. 1993, 3365, 3366, seems to recognize the clear distinction between a tenant or cropper on the one side and a mere servant, employed to do certain work for hire, and remedies, both civil and criminal, are provided to enforce the rights of the landowner against the defaulting tenant or cropper.

A case very much in point is *Barron v. Collins,* 49 Ga., 580, which was an action against the defendant for enticing one Charles Barron, a cropper, from the plaintiff's service, and it was held that it not being a contract of service, the demurrer to the declaration was properly sustained.

We have never understood that, in law, either a tenant or a cropper is the servant of the landowner. So far as an indictment of this kind is concerned, there is no essential difference between a tenant and a cropper.

The mere fact that the tenant pays rent and has an interest in the land, and a croppr only an interest in the crop which is grown upon the land, when the latter furnishes the labor, his own and that of others, and pays half the expense of making the crop, does not so differentiate the two cases as to make the cropper indictable when the tenant would not be. A tenant and cropper are more independent of the landowner than is a servant, and neither owes him the duty of allegiance or of rendering service, as growing out of their relation to him.

The Attorney-General very frankly admitted that the prosecution could not be sustained. We may remark that *Haskins v. Royster,* 70 N. C., 601, was an action at common law for maliciously—that is, without lawful justification—inducing laborers to break their contract and quit the service of their employer, and stands upon a ground and is upheld for a reason altogether different from any that we can possibly apply to these facts. The case, when properly considered, is really an authority for the position that defendants were not indictable in this case. The dissenting

opinion of *Justice Reade* draws the distinction very sharply and properly between a mere servant and a tenant or cropper, although we may not assent to his individual conclusion. Nor do we think the difference between the two relations which he defines so clearly does in any sense conflict with the decision of the majority.

The motion for judgment of nonsuit should have been granted, and there was error in refusing it. It will accordingly be entered in the court below and the prosecution dismissed.

Reversed.

STATE v. CHARLES G. LIPKIN.

(Filed 24 February, 1915.)

1. Statutes—Constitutional Law—Police Regulations—Lotteries.

A "lottery" or game of chance is one injuriously affecting the morals of the people, and laws and regulations necessary for the protection of the health, morals, and safety of society are strictly within the legitimate exercise of the police power of the State, and being of a remedial nature, they will be so construed as to suppress the mischief and advance the remedy, and to defeat all evasions for the continuance of the mischief.

2. Same—Definition of Lottery.

The word "lottery" is not a term of the common law with a recognized and established legal definition, and the courts in construing a remedial statute affecting lotteries, or schemes for disposing of real and personal property by chance, will give a meaning to the term according to its use in a popular sense, and with reference to the mischief it is intended to redress. Hence, a lottery may be defined, for all practical purposes, any scheme for the distribution of prizes, by lot or chance, by which one on paying money or giving any other thing of value to another obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine.

3. Same—Advertising Scheme.

A concern selling furniture at a certain fixed price, giving the purchaser a choice of a variety of articles therefor, upon payment of a small weekly sum until the amount is paid, with the agreement that the concern may, at its own discretion, and as an advertisement, at any time, give the furniture to the purchaser without his making further payment, and by no fixed rule, and providing that should he fail to continue his payments he shall forfeit all payments theretofore made by him, is engaging in running a lottery, by whatever name called, or by whatever artifice concealed, in violation of our statute, Revisal, sec. 3726.

4. Statutes—Lottery—Federal Constitution—Property Rights—Equal Protection.

The enactment of a law for the suppression of lotteries lies within the police power of a State, and its enforcement does not wrongfully deprive a citizen of his private rights or of the equal protection of the law under the Constitution of the United States, Article XIV, sec. 1.

5. Statutes—Constitutional Law—Power of Courts.

The question as to whether the Legislature has exceeded its constitutional power by arbitrarily interfering with private business or imposing unusual and unnecessary restrictions upon lawful occupations is for the determination of the courts.

APPEAL by defendant from *Ferguson, J.,* at September Term, 1914, of EDGECOMBE.

The prisoner was indicted in the court below for conducting a lottery in violation of Revisal, sec. 3726, which provides that it shall be unlawful to open, set up, promote, or carry on a lottery, publicly or privately, by any name or style, or by such ways and means expose to sale any real or personal property therein described, or goods or chattels, or anything of value whatsoever, and imposing a fine or imprisonment as the punishment for the offense as a misdemeanor. It also provides that any person who engages in disposing of any species of property whatsoever, money or evidences of debt, or in any manner distributes gifts or prizes upon tickets or certificates sold for that purpose shall be subject to prosecution under that section. The following is a copy of the contract referred to in the testimony of Mrs. Emma Jacobs, who first got a wardrobe under a similar contract, and afterwards contracted for a sewing machine by this instrument:

MUTUAL SUPPLY COMPANY,

INCORPORATED.

Authorized Capital, $25,000.

FURNITURE, RUGS, JEWELRY, ETC.

COMPLETE HOUSE FURNISHERS. DIRECT FROM FACTORY TO HOME, $17.50 FURNITURE SOCIETY.

CORNER NINTH AND BROAD STREETS, RICHMOND, VA.

ENTRANCE 214 N. NINTH STREET.

WHEN CALLING ON US, BRING THIS CONTRACT WITH YOU.

MUTUAL SUPPLY COMPANY, INC. CONTRACT No. 4473.

We hereby agree to sell to the holder of this contract, Mrs. Emma Jacobs, and said party agrees to purchase a sewing machine or any one of the articles enumerated on the next page for the sum of $17.50, on the following terms and conditions: Each customer agrees to pay 25 cents per week until the sum of $17.50 has been paid, or until their name is selected by the company as an advertising medium. In order to advertise our business on a broader principle, we will distribute among our patrons each week several pieces of furniture. Patrons who are selected to receive the furniture will not be required to make any further payments, and will then be entitled to receive their furniture at once, providing their payments have been made regularly.

No method of any kind dependent upon or connected with chance in any form whatsoever enters into this contract. We do not authorize agents to make statements or arrangements, verbal or otherwise, to add, change, or erase the terms of this contract.

No money can be lost by lapsing, as the amount paid in can be applied at any time to the purchase of any $17.50 article. The furniture which is distributed each week is given solely for advertising purposes, and the Mutual Supply Company, Inc., reserves the right to make the selection in such a manner as it considers best for the benefit of the business. The consideration of 25 cents paid on receipt of this contract shall constitute a full acceptance of the terms and conditions mentioned herein.

Each contract will entitle the holder to a separate article unless by special agreement in office. No money refunded if discontinued.

Partly filled contract bought or loaned from others cannot be used for redemption of articles enumerated herein.

I have read this contract before signing same and am acquainted with its contents, and as evidence that I understand and fully agree to the printed terms of this contract, I make my first payment.

Address: Tarboro, N. C. (Signature) EMMA JACOBS.

Attached to the contract was a card, so arranged with blank spaces as to enter therein the payments made in each week to the number of seventy, which would be $17.50 by addition of the weekly payments. There is also shown on the back of this paper a list of articles of furniture (value $17.50 each) to be selected from by the ticket holders, and a copy of the contract or substantial portions thereof, for the company, with a similar card for entering payments on the back. On each contract are these entries at the bottom: "When calling on us, bring this contract with you. Pay to agent only first payment. Our authorized collector will call weekly," and the title of the concern, as follows: "Mutual Supply Company, Incorporated. Authorized capital, $25,000. Furniture, Rugs, Jewelry, etc. Complete house furnishers. Direct from Factory to Home. The $17.50 Furniture Society, Corner Ninth and Broad Streets, Richmond, Va. Entrance 214 N. Ninth Street. No other but the stipulated terms in this contract will be recognized."

Mrs. Emma Jacobs, a witness for the State, testified: "I live in Tarboro. Mr. Lipkin, the defendant, came to see me last March. Said he was from Richmond. That he wanted to get up a club to establish his furniture. I signed contract for wardrobe. (Admitted to be identical with 4473, taken also by this witness.) Defendant collected 25 cents each week, and I was to get wardrobe. I was going away, and paid $2.25 in advance, and he said this would be all right. He, defendant, never said anything; just said he didn't know when my name would be called

out. I did not get away, and I received card saying my wardrobe was here. I think wardrobe was worth $25. I paid $3.75 in installments. I took out other contracts to get sewing machine and sideboard. I paid installments to Mr. Lipkin. I can't say how many came to see my sideboard, so many did. I was in my room. Mr. Lipkin came in and asked me if I did not want to join the club, and told me how it worked; that he did not know when my name would be called, and I would pay 25 cents a week until it was called, and when I thought I was going away I paid in advance. He said I would have to pay until my name was called out. It might be a long time or a short time. I expected to have to fill my card clean out, that is, pay $17.50. I received notice from Richmond that my name had been called out, and then received wardrobe and paid in $3.75. Mr. Lipkin came to my house every Monday to collect. I don't remember any conversation except he would just come and say for me to pay. I was perfectly satisfied with furniture I got. A good many people came there to see my furniture. I understood if I got others to join, I would get piece of furniture. They told me if I got piece, others would join. Others came and saw my piece and said they were going to join. I stopped paying after Mr. Lipkin was indicted, because I thought I was going away. I was perfectly satisfied and have heard no one complain."

Oscar Lloyd, witness for the State, testified: "I am a barber, single man, and live in Tarboro. I signed that contract of Mutual Supply Company, No. 4492, for the purchase of a brass bed at $17.50. (It is admitted this contract is identical with No. 4473 of Emma Jacobs.) Mr. Lipkin did not get me to sign, but he came round to collect. Mr. Lipkin, when I asked him, said I would have to pay until I got something. If I got out, I would lose what I had paid in. I paid in 75 cents, three installments. I have never gotten anything. I stopped paying because I thought I was not going to get anything. No one told me to stop. I expected to get something if I stayed in. I stopped because I got tired paying in and not getting anything."

R. B. Hyatt, witness for the State, testified: "I am sheriff of Edgecombe and I know the defendant. He told me that he was representing a furniture house in Richmond. I told him a drawing like that was a violation of law. He said he was going to try it, and that it was an advertising scheme. He went on for some time before I arrested him. He said some of the members were to be drawn out each week. He was arrested 11 June. At the trial before the recorder, when he was convicted, it was understood there would be no new contracts, but collections would be made on the contracts existing and everybody was to act in good faith pending the appeal in this case. I can't be positive he said selection or drawing. Selection might have been his word; I don't recall.

I know one was to come off every week, but I don't recall if it was a drawing or selection."

The State rested its case.

The defendant moved to dismiss the action or for judgment of nonsuit, under chapter 73, Laws 1913. Motion denied. Defendant excepted.

Mr. Abrams, only witness of defendant, testified: "I live in Richmond, Va. I am office manager of the Mutual Supply Company. I have been with them one year. I am familiar with their manner of doing business. Many thousands of dollars worth of stock is kept on hand. When an agent sells a contract, it is executed in duplicate. One copy is left with purchaser and the original is filed. I have charge of them. In selections of furniture to be given members, there is no drawing of any kind. The selection is made in the following way: Many pieces of furniture are given away. For instance, if Mrs. Jacobs benefits the company, she receives her piece of furniture. We receive information from our agents if customers are benefiting business. The agent soliciting the trade keeps a record, which is filed with company, showing what benefit customer is to business, and when furniture is given we expect her to recommend her friends. Emma Jacobs gave us several names and her friends bought furniture. That is the advertising feature spoken of in contract, and she was selected for reason of advertisement. The article furnished Emma Jacobs was worth $17.50. Mr. Lipkin, the defendant, is our local collector. He got those contracts. I did not say Emma Jacobs got a $25 wardrobe for $3.75. I said it was worth $17.50. Mrs. Gray Andrews, of this place, was of great benefit to company. I have no stock in Mutual Supply Company. The principal office is at 214 N. Ninth Street, Richmond, Va. Our chief warehouse is at 30 N. Seventh Street. It is a three-story building. We have all kinds of furniture direct from factory to home. We do not store much furniture. We have a great deal on hand. Mrs. Andrews paid 25 cents. She was of much benefit. Somebody got a brass bed. We may give away our furniture if we wish. We have many thousands of members. We have not been run out of Rocky Mount, but are doing business there today. We number the contracts because we have many alike, and every contract is numbered and filed according to number. The numbers have nothing to do with selections. At present we give away things to advertise. I do not know of any concern like ours in Richmond. The numbers are put on contracts for the purpose of bookkeeping. Our agent is collecting in Rocky Mount this week. The only trouble we have had is in Wilmington, and it was agreed here we were to take no new contracts pending this appeal. Complaint was made by a dissatisfied customer in District of Columbia, and the district attorney investigated and refused to prosecute."

The State and defendant closed the case. Defendant renewed his motion to nonsuit or dismiss under chapter 73, Laws 1913. Motion refused. Defendant excepted. In apt time the defendant requested the court to give the following instructions to the jury:

1. If the jury find the evidence offered by the State to be true, then they will return a verdict of "Not guilty."

2. If the jury find the undisputed evidence offered in this case to be true, then they will return a verdict of "Not guilty."

3. The jury are instructed that if they find the evidence offered by the State to be true, they will return a verdict of "Not guilty," for that if section 3726 of the Revisal of 1905, under which this prosecution is had, undertakes to prohibit the carrying on of the business of the Mutual Supply Company, Incorporated, for which defendant is salesman or agent, as is shown here by the evidence and contract, it would be void as contravening the Constitution of the United States, for the following reasons: (1) Because said section to that extent would be in violation of first section of Article XIV of the said Constitution of the United States, because it would deprive the defendant of his liberty and property without due process of law; and (2) because it would deprive the defendant under the first section, Article XIV of the Constitution of the United States of the equal protection of the laws, in this: that the furniture allotted to certain customers for advertising purposes under the terms of the contract offered in evidence does not come within the prohibition of said section 3726 of Revisal 1905.

The court refused to give any of these instructions, and defendant excepted. The court instructed the jury, if they believed the evidence, to return a verdict of "Guilty." Defendant excepted. Verdict of guilty and judgment thereon. Defendant appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Melville Flegenheimer and J. M. Norfleet for defendant.

WALKER, J., after stating the case: It is well settled that laws and regulations necessary for the protection of the health, morals, and safety of society are strictly within the legitimate exercise of the police power, and in the interpretation of such remedial statutes the office of the judges, it has been said, is to make such a construction as will suppress the mischief and advance the remedy, and to defeat all evasions for the continuance of the mischief. *Magdalen College case*, 11 Co., 71 b. The word "lottery" is not a term of the common law, and to dispose of real or personal property by lot is not an offense which has a recognized and established legal definition, and, therefore, in construing the statute we must be guided chiefly by the meaning of the term as it is ordinarily

used in a popular sense, and by reference to the mischief intended to be redressed. *S. v. Clarke,* 33 N. H., 329. A lottery, for all practical purposes, may be defined as any scheme for the distribution of prizes, by lot or chance, by which one, on paying money or giving any other thing of value to another, obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine. This definition has generally been approved by the authorities. *S. v. Perry,* 154 N. C., 616, and cases cited; *Long v. State,* 74 Md., 565. In the case last cited, as showing the strong trend of judicial thought in this country against lottery enterprises, the Court said that it will appear, from the many cases decided upon the subject, to be difficult, if not impossible, for the most ingenious and subtle mind to devise any scheme or plan, short of a gratuitous distribution of property, which has not been adjudged as in violation of the lottery or gambling laws of the various States, which are mostly alike. And we say that no sooner is a lottery defined, and the definition applied to a given state of facts, than ingenuity is at work to evolve some scheme of evasion which is within the mischief, but not quite within the letter of the definition. But, in this way, it is not possible to escape the law's condemnation, for it will strip the transaction of all its thin and false apparel and consider it in its very nakedness. It will look to the substance and not to the form of it, in order to disclose its real elements and the pernicious tendencies which the law is seeking to prevent. The Court will inquire, not into the name, but into the game, however skillfully disguised, in order to ascertain if it is prohibited, or if it has the element of chance. It is the one playing at the game who is influenced by the hope enticingly held out, which is often false or disappointing, that he will, perhaps and by good luck, get something for nothing, or a great deal for a very little outlay. This is the lure that draws the credulous and unsuspecting into the deceptive scheme, and it is what the law denounces as wrong and demoralizing.

In *Thomas v. People,* 59 Ill., 160, it was urged, in defense of a similar scheme, that no plan of distribution had been decided upon; that the purchasers were to receive certain articles in a just and legal manner, and that a plan might be devised, at the proper time, which would neither violate the law nor be in contravention of good morals. The Court replied that if the prizes were distributed "in a just and legal manner" it should be done in an honest, upright, and equitable one, and there should be perfect fairness and equality. The plan would be utterly violated if any one of the numerous purchasers should fail to receive a prize. The distribution could not be in a "just and legal manner" unless the number of purchasers was the same as the number of prizes, and the prize received proportional, as nearly as possible, to the amount of

money paid. It is barely possible, but most improbable, that the purchasers would be the same in number as the presents. We could not indulge in so unreasonable a presumption, even in a criminal proceeding. In ordinary affairs we must reason upon probabilities, deduce conclusions from facts, and not indulge in mere conjectures. We have no right to harbor wild imaginings to change a reasonable and probable result. The Court then says: "Had not this plan been watched by the vigilance of the law, can there be any doubt that numerous persons would have purchased tickets, prompted by the hope of gain? Are there not inseparably connected with it the same fascination and excitement and intense desire for gain which gather around the gaming table? Like any other species of gambling, lotteries have a pernicious influence upon the character of all engaged in them. This influence may be as direct and the immediate consequences as disastrous as in some kinds of gambling which rouse the violent passions and stake the gambler's whole fortune upon the throw of a die. The temptations, however, are thrown in the way of a larger number and a better class. The evil may spread more widely and infect more deeply. It is said that the plan was undetermined, and that the wisdom of the 'advisory committee would have devised one, just and equal.' So chance is always undetermined. It neither forms nor designs. Intention is never attributed to it; its events are uncertain. The promise of the handbill, that the distribution shall be in a just and legal manner, is evasive. We are not bound to determine the intention from the language alone, but from all the facts, and the reasonable deductions from facts."

That case is a fair comment and a just criticism upon the facts of this one, showing the clear illegality of the transaction. It is not pretended here that the projector of this enterprise, either in the matter of volition, as to the giving of presents, or of approbation, as to the recipients of them, founds its action on any settled rule of conduct, or judges by any standard of comparison or selection which would appear reasonable to itself or to others. *S. v. Shorts*, 32 N. J. L., 398; *Com. v. Wright*, 137 Mass, 250. So far as appears, the choice among those who are to receive its favors is based upon nothing more than its arbitrary will, exercised for its own benefit, in advancing its scheme by advertising, it may be admitted, but this does not alter the case, as all such concerns are organized and set up for just this purpose. Nor does it matter that the person who buys a chance for a trivial sum, in the expectation of winning something of much larger value, can go on with his contributions, and, after paying the full amount of $17.50, get the piece of furniture he may want. This has been held not to divest it of its gambling quality. *S. v. Perry, supra; Deflorin v. State*, 121 Ga., 593; *S. v. Moren*, 48 Minn., 555. In the case last cited it is said that such a feature would

probably operate as an additional incentive to purchase a chance in the lottery scheme, and does not take it out of the statute, as the vicious element still inheres in it. The sale of the ticket gave the purchaser the chance to obtain something more than he paid for it, and the other fact became an extra inducement for the purchase, making the general scheme more attractive and alluring. The difference between it and a single wager on the cast of a die is only one of degree. They are both intended to attract the player to the game, and have practically the effect of inducing others, by this easy and cheap method of acquiring property of value, to speculate on chances in the hope that their winnings may far exceed their investment in value. This is what the law aims to prevent in the interest of fair play and correct dealing, and in order to protect the unwary against the insidious wiles of the fakir or the deceitful practices of the nimble trickster. Call the business what you may, a "gift sale," "advertising scheme," or what not, but it is none the less a lottery, and we cannot permit the promoter to evade the penalties of the law by so transparent a device as a mere change in style from those which have been judicially condemned, if the gambling element is there, however deep it may be covered with fair words or deceitful promises. If it differs from ordinary lotteries, it is chiefly in the fact that it is more artfully contrived to impose upon the ignorant and credulous, and is, therefore, more thoroughly dishonest and injurious to society. So far as those who manage schemes of this character can be supposed to give the credulous persons who deal with them any chance whatever of a return in greater value for their investment, the chance lies in the purchase of the right to participate in the favor offered or held out to tempt the gambling instinct and thereby to prosper the business of the unlawful concern. *Dunn v. The People,* 40 Ill., 465. All pay them money, at least in part, for the *chance* of winning a prize of greater or less value in proportion to what they hazard, however it may be glossed with some apparent safeguard against loss. Many will take the chance of the play, not expecting to continue the payments if they should lose at the first, second, or third attempt, or at some later period. According to every correct idea of legal definition or conception, this must be gaming within the meaning of the law, whether we construe it in letter or in spirit. All new artifices designed to evade and cheat the law, and entrap the unwary or ignorant, are but aggravations of the offense, and the more ingenious and deep-laid they are, the greater the wrong. *Bell v. State,* 37 Tenn. (5 Speed), 507.

In the *Deflorin case, supra,* referring to the contention of the defendant that the purchaser of a ticket could continue to pay and get the goods, the Court said: "The fact that a member who was unlucky in the drawing of prizes might, by continuing to pay a dollar a week for thirty

weeks, receive a suit of clothes, regardless of the result of the drawings, does not make the transaction any the less a lottery; for the lucky members of the club won prizes varying in value from $1 to $29." And the Court quoted from *Shumate's case*, 15 Grattan (Va.), 653, the following passage as a full answer to the position: "It is true that a bet does imply risk, but it does not necessarily imply a risk in *both* parties. There must be between them a chance of gain and a chance of loss, but it does not follow that each of the parties to the bet must have both these chances. If, from the terms of the engagement, one of the parties may gain, but cannot lose, and the other may lose, but cannot gain, and there must be either a gain by the one or a loss by the other, according to the happening of the contingency, it is as much a bet or wager as if the parties had shared equally the chances of gain and of loss." See, also, an elaborate and exhaustive discussion of the question by *Justice Cobb*, in *Myer v. State*, 112 Ga., 20.

The ingredient of chance is, obviously, the evil principle which the law denounces and will eradicate, however it may be clothed, or however it may conceal itself in a fair exterior. It is by this means that cupidity is solicited or an appeal is made to avarice, for if fortune be propitious, or chance should favor him, either in his selection as the winner of its favor or in the mere turn of a wheel, or the throw of the dice, or the fall of the coin, a return of value is expected for the small consideration or trivial price paid for the privilege of being thus favored. *S. v. Shorts*, 32 N. J. L., 398.

The case of *S. v. Clarke*, 33 N. H., 329, appears to be very much in point. The Court said of a similar enterprise: "The jury were well warranted in finding that according to some scheme upon which the defendants professed to act there was a correspondence between the numbers placed on the books purchased and the different articles proposed as gifts or prizes, by which when the book was purchased the defendants ascertained what gift or prize the purchaser was entitled to have according to their scheme. The defendants, on the evidence, appear to have held out that notion to the public, and the jury were at liberty to find that, so far at least, the business was fairly conducted. The purchaser did not know when he bought his book and paid his money what prize or gift the number on it would entitle him to receive, and it was with him as much a matter of lot and chance as if he had drawn the number from a hat. He paid more than the book was worth, and the excess must be understood to have been paid for this chance. As to the real nature of the contrivance, it stands as if the excess had been paid for the chance without any sale of a book to color the transaction."

The same contention was made there as in this case, that the choice of persons to receive the furniture was not by lot or chance, but by the

judgment of the company which proposed to sell but the Court rejected it, and thus showed its fallacy: "With the purchaser, what prize he might obtain was a mere matter of lot and chance. The scheme involved substantially the same sort of gambling upon chances as in any other kind of lottery. It appealed to the same disposition for engaging in hazards and chances with the hope that luck and good fortune may give a great return for a small outlay, and, as we think, within the general meaning of the word 'lottery,' and clearly within the mischief against which the statute is aimed." *Randle v. State,* 42 Texas, 580.

Defendant's counsel, in their able and learned argument, have cited us to *People v. Elliott,* 3 L. R. Anno. (O. S.), 403; but upon examining the case we find this stated: "It is not the drawing of the lots, but the disposing and selling of the chances, that brings the case within the statute. It is promoting the lottery for money by paying the money for the chances of receiving more. It is of little consequence where the drawing takes place. These views to some extent will be found supported in the following authorities: (citing many cases). It is thought by counsel for defendant that this case is ruled by *People v. Reilly,* 50 Mich., 384. That case, however, is different. There the contingency was one upon which the parties interested could exercise their reason and judgment under an agreement upon which the money was paid, and was in its nature executory. In this case the money was paid when the chance was obtained, and there was no opportunity for exercising the reason or judgment or any other faculty of the mind; and hence the lottery."

We think this substantially supports our view of the question. So far as we can see from the evidence, the managers of the "Mutual Supply Company" exercised no more than an arbitrary choice of its customers as recipients of its graft; but however that may be in fact, the vice of the whole scheme lies farther back than that, and is found in the "chance" which the customer takes when he pays his money, under the terms of the contract, and the temptation held out to arouse the gambling spirit, which is just as evil and debasing as if there were any other kind of chance taken; and, besides, if he fails once or twice or more times to win the prize, and discontinues paying, he loses all that he has paid. So that if tempted by this cunning device, which so insidiously appeals to this gambling instinct, his money is risked in the hope of drawing a piece of furniture of much larger value, the person so investing it may lose or win, and in either event may retire, forfeiting what he had paid in the one case, and retaining what he has drawn in the other as the profit of his venture.

The only difference between this case and that of *S. v. Perry,* 154 N. C., 616, is that there the suit of clothing was drawn by lot; but there

is the same element of chance here, even if in a less degree, as there is no rule or standard for the investor to determine what his luck will be, nor can the managers of the scheme forecast at the time of hazard what the result will be. Mrs. Jacobs, as the evidence shows, performed no services, if any at all, until after she had received the wardrobe, which she exhibited and extolled to her friends, who doubtless considered it a good return for so small an outlay in money, and concluded to take the same risk, hoping to be favored with the same kind of good fortune. The temptation was increased by holding out that they might not lose if they continued in the game to the end. *S. v. Perry, supra,* where we held, citing 25 Cyc., 1639: "Suit clubs, the members of which pay weekly dues and have weekly drawings for suits, the unsuccessful members being entitled to receive a suit eventually, after the payment of a stipulated amount, or to withdraw and take out in trade the installments which they have paid, are lottery schemes." We further said in that case: "It will be seen by examination of the authorities that chance is an essential element of a lottery, whether that chance be as to any return or merely as to the amount or value of the return; and as thus considered, where there is a hazard in which sums are ventured upon the chance of obtaining a greater value, the scheme partakes of the nature of a lottery—that is, something gained or won by lot. 5 Words and Phrases, pp. 4245 and 4246, where many cases are collected. The definition of the term 'lottery' given above has been approved by this Court. *S. v. Lumsden,* 89 N. C., 572."

In the view we take of the case, it comes within that principle, and the courts will not be deceived or misled by attractive names or professions of honest intentions. As said by the Court in *S. v. Morris,* 77 N. C., at p. 516, referring to the language of *Justice Grier* in *Phalen v. Virginia,* 8 How. (U. S.), 168: "The 'North Carolina Beneficial Association' is an imposing title, but the law has pronounced it in its lottery features to be a cheat and a nuisance to be suppressed like other public pestilences. Of all the forms of gambling, it is the most widespread and disastrous, entering almost every dwelling, reaching every class, preying upon the hard earnings of the poor, and plundering the ignorant and simple."

Having decided this question against defendant, it follows that, if we are right, there is nothing in the case involving the violation of defendant's rights under the fourteenth amendment to the Federal Constitution. The State has the right to enforce all needful police laws and regulations for the preservation of the health, morals, and safety of the people, and especially for the suppression of lotteries. *Boyd v. Alabama,* 94 U. S., 645; *Stone v. Mississippi,* 101 U. S., 814; *Douglass v. Kentucky,* 168 U. S. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or im-

pose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination of its police powers is not final or conclusive, but is subject to the supervision of the courts. This must needs be so, and it was so definitely held in *Lawston v. Steele,* 152 U. S., 133; but no violation of private right is presented in this case.

We are also inclined to the opinion that the Legislature intended by the last words of section 3726, being the amendment made by Laws 1874-5, ch. 96, to enlarge the scope of the previous enactment so as to include enterprises of this kind; but it is unnecessary to decide this question, as it is sufficient to hold that the scheme is a lottery within the intent and meaning of the statute.

No error.

STATE v. R. H. HAYNIE.

(Filed 3 March, 1915.)

1. Easements—Private Ways—Public Use.

A reservation by deed to the grantor of a restricted easement across the lands conveyed, without defining or locating it, and which has not since been located, the grantor and his family going across the lands conveyed whenever they choose, is insufficient proof of an established right of way across the lands, much less of a cartway, and still less of a public way.

2. Same—Statutes—Taking of Private Property—Constitutional Law.

An act of the Legislature which declares private ways, restricted in their use, over the lands of the owner to be public ways, making their obstruction by the owner punishable under the criminal laws, is the taking of private property for a public use without just compensation, and is unconstitutional.

3. Same—Due Process—Limitation of Actions.

A public-local law which shortens the period for the running of the statute of limitations to a time already expired and depriving the owner of lands of his right to stop the public user of a private right of way thereover, and declares the right of way a public one, is unconstitutional in taking the property of the owner without due process of law and in denying him the equal protection of the laws.

4. Statutes—Declaratory—Interpretation—Vested Rights—Retroactive Laws.

Statutes which deprive citizens of their rights under former laws should not be construed to be retroactive unless the legislative intention to that effect clearly appears therefrom.

5. Easements—Dedication—Acceptance—Presumptions—Statutes.

In order to establish an easement for the public use over the lands of a private owner, there must be a dedication thereof by the owner and an acceptance on the part of the proper authorities, or acts on the part of both which would, expressly or impliedly, amount thereto, or presume a grant, or an acquisition thereof for the public use in some legal and recognized manner. Revisal, sec. 3784.

6. Statutes, Declaratory—Vested Rights—Constitutional Law—Courts.

Declaratory laws cannot deprive a citizen of his vested rights in property by changing the rule of construction as to preëxisting laws; and where the legislative construction is erroneous and law unconstitutional, the courts will so declare.

7. Statutes—Constitutional Law—Criminal Law—Appeal and Error.

Where a statute unlawfully declares a private cartway over the lands of the owner a public way, and makes an obstruction thereof by the owner punishable under the criminal law, a conviction thereof by the owner in the Superior Court will be set aside on appeal.

APPEAL by defendant from *Cline, J.*, at September Term, 1914, of MADISON.

Indictment for obstructing a way. It requires only a consideration of the following facts, which appear in the record, to understand the questions presented. We give here a statement of them which, we think, presents the case fully and fairly.

This was a criminal action brought by the State at the instance of D. P. Miles, prosecutor, against the defendant R. H. Haynie. The defendant was first tried in the recorder's court of Madison County, upon a warrant issued by that court, for an alleged violation of chapter 40, section 23, of the Public-Local Laws of the 1913 session of the General Assembly of North Carolina, which, as alleged, consisted in the obstruction of a cartway over the lands of the defendant Haynie, and was convicted in that court, and the defendant appealed to the Superior Court, and was there tried upon such warrant before his Honor, E. B. Cline, judge presiding, and a jury, at September Term, 1914, of Madison County Superior Court. The lands owned by the defendant Haynie, as well also as those owned by the prosecutor, D. P. Miles, originally belonged to C. A. Nichols and wife, Bettie J. Nichols. By deed bearing date 1 March, 1894, Nichols and wife conveyed to Miles the land lying back of the Haynie lands, which at that time still remained unsold and belonged to Nichols. This deed granted to Miles a right of way "at such convenient points as they may designate" over the unsold lands of C. A. Nichols and wife, and reserved to Nichols, his heirs and assigns, a similar right of way over the lands conveyed to Miles. This deed was acknowledged before E. F. Vandiver, a justice of the peace for Buncombe County, whose certificate was attached; but the clerk of the court of Madison County, in ordering the registration of said deed, failed to pass upon the certificate of E. F. Vandiver, as aforesaid. On this and the further ground that said deed only purported to convey at most a private and indefinite right of way in which the public generally could acquire no interest, the defendant's counsel objected to said deed being admitted in evidence, but the objection was overruled, the deed admitted, and the defendant excepted.

Subsequent to the execution of the above mentioned deed to the prosecutor, D. P. Miles, towit, on 19 November, 1904, C. A. Nichols and wife, Bettie J. Nichols, conveyed by deed (set out as defendant's Exhibit "B") to the defendant R. H. Haynie the land over which the said defendant is alleged to have obstructed the cartway. This placed the Haynie lands, or the servient tenement, between the main road and Miles' lands, or the dominant tenement.

According to the evidence of Mr. Miles, the State's witness, as set out in the record, when he went into possession of the land conveyed to him by Nichols and wife there was an old road across the land now owned by Haynie, and they sometimes came out over that old road and sometimes zigzagged over Haynie's lands, according to the whim of the teams or the drivers, and when the road was miry they went anywhere over the land of Haynie they wanted to. The witness further testified that the road across the defendant Haynie's land was not a public road, but that it was simply a private road.

The State at no time offered any testimony to attach any public interest to the road, but relied on the statute aforesaid to give to said road a public character, after having shown that said road had been used as a private road or private cartway for ten years or more.

At the conclusion of the State's testimony the defendant moved for judgment as of nonsuit under the statute, on the ground that, taking all the testimony as true, the defendant was not guilty. The motion was overruled, and the defendant excepted.

The defendant then introduced testimony further showing the private nature of the right of way existing over the defendant's lands, and also to the effect that part of said road had been blocked by the defendant and his agents for at least ten years prior to the present indictment; that people who wanted to get back to the Nichols land just went where they pleased indiscriminately over the Haynie lands, and that the road had never been kept up (by) the public. The State put other witnesses on the stand, but never offered any testimony showing that the road in question was ever kept up as a public road or that any petition had ever been filed to establish a cartway over the land of the defendant in the manner prescribed by law; but the State relied on the deed made by Nichols and wife to D. P. Miles, together with the statute, chapter 40, sec. 23, of the Public-Local Laws of 1913 aforesaid, for the conviction of the defendant. In short, the State never went further than to show that the road in question was only a private right of way granted by one individual for the private and exclusive use of another individual, in which the public was not intended to acquire nor did it acquire any interest at all whatsoever.

At the conclusion of all the testimony the defendant renewed his motion to dismiss the action for that according to all the testimony the

road was only a private road and had never been kept up as a public road, and no petition had ever been filed or cartway established in the manner prescribed by law; but the motion was again overruled, and defendant excepted.

The court instructed the jury that if there was a private road, that if it was used as a cartway for as much as ten years prior to the issuance of the warrant in this case, and that if the defendant obstructed it by building a fence across it, without leaving any means of passage through it, that then said defendant would be guilty under the statute aforesaid (Public-Local Laws 1913, ch. 40, sec. 23).

Defendant was convicted, a fine was imposed on him, and the costs adjudged against him, and he was further required to open and keep open the said road, from which judgment he appealed, having reserved his exceptions.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Smathers & Ward for defendant.

WALKER, J., after stating the case: This statement of the facts shows that what is termed in the case a cartway was only a private way over the lands of C. A. Nichols remaining after he had sold the other tract to D. P. Miles, and its use, or the private easement over it, was restricted to him. Besides, there was no certain or definite description of the way, and Miles, or the persons who lived with him on his land, members of his family or tenants, used to go in almost any direction over the Haynie land. This surely is not sufficient proof of a right of way, and much less of a cartway, and still less of a public way. It is virtually conceded that this is so, if we are to follow *Boyden v. Achenbach*, 79 N. C., 539, and the very numerous decisions which have affirmed it, and to be found at the foot of that case as reported in the annotated edition of 79 N. C., at marg. p. 543, bottom pp. 405, 406, among the most recent of which are *S. v. Lucas*, 124 N. C., 806; *Milliken v. Denny*, 141 N. C., 227; *Tise v. Whitaker*, 146 N. C., 376; *Balliere v. Shingle Co.*, 150 N. C., 633; *Snowden v. Bell*, 159 N. C., 500.

This being the case, it was clearly not within the power of the Legislature to appropriate the land of defendant, or any part thereof, however small, to a public use without just compensation. *R. R. v. Davis*, 19 N. C., 451; *Johnston v. Rankin*, 70 N. C., 550; *Brown v. Power Co.*, 140 N. C., 333. And it cannot, under the guise of calling it a cartway, take away this protection from the owner. Besides, a cartway is, at least, a *quasi*-public road, and to convert an ordinary private way, if properly established, into a cartway is a taking of private property for a public use (*Cook v. Vickers*, 141 N. C., 101) which entitles the owner to com-

pensation. If the public needs it, let it pay a fair price for it, as we have so often said. *S. v. Jones,* 139 N. C., 613. As the *Chief Justice* said, in *R. R. v. Oates,* 164 N. C., at p. 171: "A man's land should stand condemned when, and only when, every step which the law prescribes to that end has been complied with." The State cannot even impose a new or additional burden on the land, or increase an easement in it, without just compensation. *Brown v. Power Co., supra.* This private way is not within the descriptive words of the Public-Local Laws of 1913, ch. 40, sec. 23. It was not a cartway, or used as a cartway, and no particular way which had been marked out and located, by contract or user, had been so used by the public for a period of ten years. It is straining the meaning of the statute and misconstruing the evidence in this case to say that this private way, if it had been delineated, was intended to be affected by the statute. But if we should admit that it does come within its letter or its spirit, another fatal objection arises, namely, that the Legislature has condemned this way to the public use without making any provision for compensation, and, what is worse, without, after the ten years had expired, giving the owner time or opportunity to stop the public user, if there had been any, and save his rights. This is taking private property without due process of law and withdrawing from this landowner the equal protection of the law. He has had no notice, hearing, or judgment. It would be an arbitrary and despotic exercise of power if the Legislature had intended to exercise it, which it manifestly did not, as we have shown.

This statute, while called a public-local law, was evidently promoted to subserve some private end, as acts of the kind usually are, and they deprive people summarily of rights which cannot so easily be taken from them otherwise and by the ordinary course of judicial procedure. This statute shortens the time by ten years for barring such rights, if, under *Boyden v. Achenbach, supra,* they can be divested at all by such a user. It goes further, and declares that private property shall be devoted to a public use, that is, that a private way shall become a public way, after ten years user, when the time has already elapsed, which the highest Federal court has held is a violation of the Federal Constitution, and we have held that it is a violation of our own. The property is taken against the will of the owner, without his having a day in court. *Hart v. Lamphire,* 3 Peters (U. S.), 280 (7 L. Ed., 679); *Sohn v. Waterson,* 17 Wall. (U. S.), 596 (21 L. Ed., 737); *Wheeler v. Jackson,* 137 U. S., 245; *McFarland v. Jackson, ibid.,* 258. In *Sohn v. Waterson, supra,* the Court held that an existing right of action cannot be divested by shortening the period of limitation to a time which has already run. See, also, *State of Tennessee v. Sneed,* 96 U. S., 69; *Terry v. Anderson,* 95 U. S., 633, and *Koshkonong v. Burton,* 104 U. S., 668 (26 L. Ed., 886), where

the Court held that in this country, where the legislative power is limited by written constitutions, declaratory laws, so far as they operate on vested rights, can have no legal effect in depriving an individual of his rights or to change the rule of construction as to the preëxisting law. Courts will treat such laws with all the respect that is due to them as the expression of the opinion of the individual members of the Legislature as to what the rule of law previously was, but beyond that they have no binding effect, and if the judge is satisfied that the legislative construction is wrong, he is obliged to disregard it. The Court then proceeds to declare that such statutes will be construed prospectively rather than retrospectively, as giving the rule for the determination of rights in the future rather than those which are already vested, and, therefore, relate to the past. Any other doctrine would be inconsistent with right and reason. And our law is the same, for our Constitution is as fully adequate to protect the individual against such an encroachment upon his rights as is the Federal Constitution. We have held distinctly that a statute will not be construed as restrospective in its operation unless it was clearly intended so to be, and especially where such a construction would take away rights under a former law, though they may be of a kind which the Legislature could divest by proper action, if so minded. *Elizabeth City v. Comrs.*, 146 N. C., 542. Statutes which restrict private rights or the use of property, and especially those which tend to destroy them, should be strictly construed in favor of the citizen. *Nance v. R. R.*, 149 N. C., 371. It would be contrary to the plainest dictates of justice to hold otherwise. If this statute should be given retrospective operation, so that the ten years already passed would bar the right, it would be the same as appropriating the property directly without any reference to the lapse of time.

There is no evidence of a dedication to the *public* in this case, and we have seen that, under *Boyden v. Achenbach, supra*, there has been no such user as will presume it or give the public any right or easement in the way. That the defendant is not indictable under the facts of this case, where the public has acquired no such right in the way and the public authorities have not assumed the obligation to work the road and keep it in order, is expressly decided in *S. v. Stewart*, 91 N. C., 566; *S. v. Lucas*, 124 N. C., 804; *S. v. Purefoy*, 86 N. C., 682. "A *public highway* is one established by public authority and kept in order by the public, under the direction of the law; or else it is one used generally by the public for twenty years, and over which the public authorities have exerted control, and for the reparation of which they are responsible." *S. v. Purefoy, supra* (by *Ruffin, J.*), citing *S. v. McDaniel*, 53 N. C., 284, and *Boyden v. Achenbach, supra.*

The proof in this case is that the public authorities had never exercised any control over this way and that it was not regarded, in any sense, as

a public way, nor even a cartway, as that term is understood in the law. A right of way was granted to Miles as purchaser from the former owner of the land, C. A. Nichols, but it was confined to him and was strictly a private right to cross Nichols' land between Miles' home and the public road. This is not a cartway. The distinction between the two is clearly drawn in *Warlick v. Lowman,* 103 N. C., 122, 124. There has been neither condemnation, dedication (which must be with the sanction of the public authorities), nor such user by the public as to presume a grant or dedication. The following cases show conclusively that defendant is not indictable at common law or under any statute of this State: *S. v. McDaniel,* 53 N. C., 284; *Kennedy v. Williams,* 87 N. C., 8; *Stewart v. Frink,* 94 N. C., 489; *Warlick v. Lowman, supra; Burwell v. Sneed,* 104 N. C., 121; *S. v. Summerfield,* 107 N. C., 898; *S. v. Wolf,* 112 N. C., 894; *S. v. Fisher,* 117 N. C., 739. They were nearly all decided since the statute in regard to the obstruction of roads and cartways was passed. Laws 1872-3, ch. 189, sec. 6; Code, sec. 2065; Revisal, sec. 3784, referred to by the Attorney-General. Besides, the way subject to this private use or easement is neither a "highway, cartway, mill road, or road leading to a church or other place of worship," and is not within the letter or spirit of that section, as a bare reading of it will disclose, and as this Court has repeatedly decided. See cases *supra.* Many others might be cited to the same effect.

The Attorney-General frankly says, in his brief, that the defendant was indicted under the act of 1913, and almost admits that it is not applicable, for the reasons above stated, and falls back upon Revisal, sec. 3784, which, as we have seen, does not apply.

He also concedes that the deed admitted in evidence was defectively probated and registered, after a careful examination of the statute relating to the same.

For these reasons we are unable to agree with the court below, but think the motion to nonsuit should have been sustained. Judgment will be entered in the Superior Coust dismissing the prosecution, with costs as allowed by law.

Reversed.

STATE v. JAMES LANCASTER AND RICHARD PARKER.

(Filed 10 March, 1915.)

1. Appeal and Error—Criminal Law—State's Appeal—Statutes.
An appeal will lie on behalf of the State from an order quashing a bill of indictment. Revisal, 3276 (3).

2. Criminal Law—Indictment—Affray—Abusive Language.
One who by the use of such abusive language or offensive conduct towards another as is calculated and intended to bring on a fight is guilty of an affray, although he did not return the blow given him in consequence; and an indictment charging, among other things, that one of the defendants used language to the other calculated to bring on a fight, and that the fight ensued, and that they "did mutually beat and assault each other," sufficiently charges an affray.

3. Criminal Law—Indictment—Affray—Place.
In an indictment for an affray it is unnecessary to charge or prove the place where the offense is charged to have been committed. The form of the indictment in this case is held sufficient. Revisal, secs. 3254, 3255.

4. Criminal Law—Affray—Deadly Weapon—Superior Court—Jurisdiction.
The Superior Court has jurisdiction of an affray when only one of the parties engaged therein uses a deadly weapon.

5. Criminal Law—Affray—Superior Court—Motion to Quash—Justice's Court—Defenses.
One indicted in a justice's court for an affray without the use of a deadly weapon, who has therein been convicted or acquitted, may show it as a full defense, upon trial under an indictment originating in the Superior Court; but this position is not available in the latter court on a motion to quash.

APPEAL by the State from *Peebles, J.*, at October Term, 1914, of CRAVEN.

Attorney-General for the State.
D. E. Henderson for defendant.

CLARK, C. J. The defendants were indicted for an affray. The indictment charged that the defendants "did willfully and unlawfully assemble together, and did mutually assault and beat each other, Richard Parker by using language calculated and intended to bring on a fight and a fight ensuing, and James Lancaster using a deadly weapon, towit, a gun, and to, with, and against each other in a public place did fight and make an affray," etc.

The court, on its own motion, quashed the indictment as to Parker and dismissed the action as to him, from which decision the State appealed. Revisal, 3276 (3).

In *S. v. Fanning*, 94 N. C., 940, the defendants were indicted for an affray, and it was held that if a person by such abusive language or

offensive conduct towards another as is calculated and intended to bring on a fight induces that other to strike him, he is guilty, although he did not return the blow. To same purport, *S. v. Davis,* 80 N. C., 351; *S. v. Robbins,* 78 N. C., 431; *S. v. Downing,* 74 N. C., 184; *S. v. Perry,* 50 N. C., 9. Here the charge is, "Did mutually assault and beat each other."

In *S. v. Griffin,* 125 N. C., 692, it was held that the place need not be charged nor proven. The form of the indictment is sufficient. Revisal, 3254, 3255.

His Honor seems to have been of the opinion that the defendant Parker could not be tried for the affray in the Superior Court, because he did not use a deadly weapon. In *S. v. Coppersmith,* 88 N. C., 614, it is held: "An affray is cognizable in the Superior Court as to both defendants where it appears that a deadly weapon was used by either." This has been cited and approved, *S. v. Albertson,* 113 N. C., 634. To same effect, *S. v. Ray,* 89 N. C., 587, and cases cited to that case and to *S. v. Ray* in the Anno. Ed.

If Parker, not having used a deadly weapon, had been convicted or acquitted before a justice of the peace, this would have been a full defense as to him (*S. v. Fagg,* 125 N. C., 609), but this could not appear on a motion to quash.

The judgment quashing the bill as to the defendant Parker is Reversed.

STATE v. CLEVELAND SERMONS.

(Filed 24 February, 1915.)

1. Fish and Oysters—Protection—Police Powers.

Fish, including oysters, and other shellfish, etc., are a valued source of food supply, coming within the police power of the State, and are subject to the rules and regulations reasonably designed to protect them and to promote their increase and growth, and such rules and regulations may not be set aside and ignored because they indirectly affect or trench upon some private rights that are or would be ordinarily recognized.

2. Same—Statutes—License—Dealers—Private Beds.

Revisal, sec. 2411, providing for issuing a license to persons engaged in the purchasing, etc., of oysters, directing that the license shall not be issued prior to 15 November, and shall expire on the 15th of the following March; and Revisal, sec. 2395, making it a misdemeanor for any one to engage in said business without having obtained the license required, make the rights of private owners of oyster beds subservient to their provisions, they being a reasonable police regulation to promote the increase and growth of oysters, etc.; but where the dealer is one who buys oysters from the private owner of oyster beds, and conducts his business without the license required, the rights of the owner of the beds are not involved, but the right of the dealer to transact his business in violation of a positive statute.

3. Same.

Revisal, sec. 2383, as amended by chapter 967, Laws 1907, and chapter 85, Laws 1913 (Gregory's Supplement), cannot be construed together with the effect that the license is not required when oysters are shown to have been procured from private owners, there being no necessary or essential connection between the two, the first applying to all citizens of the State, and forbidding them to buy or sell oysters taken from public grounds or natural beds during a closed season, etc., and the other being a law referring only to regular dealers, requiring that they shall be licensed, and designed to render more effective the legislation in protection of the fish and oyster industries of the State.

4. Fish and Oysters—Statutes—License—Closed Season—Mandamus.

Where a dealer in oysters applies for a license at the time when the statute forbids its issuance (Revisal, sec. 2411), and is refused, it affords no defense for his continuing to do business as such; and should the license have been wrongfully refused, his recourse is to apply to the courts for mandamus to compel its issuance.

APPEAL by the State from *Carter, J.*, at October Term, 1914, of HYDE.

Criminal action, heard on appeal from a justice's court.

The relevant facts embodied in a special verdict and the proceedings and judgment of the court thereon are as follows:

"The jury having heretofore been duly impaneled, returned into court the following special verdict:

" 'That for twenty years last past the oyster bed in Hyde County known as Judith Narrows has been granted by the State of North Carolina, according to the law, and is now the private property of one Makely, who holds absolute title to same. That said oyster grounds are not now the property of the State of North Carolina; that on or about 19 October the defendant purchased from the owner of said private oyster beds a quantity of oysters which the owner had taken from said private oyster beds. That on said date, between 5 April, 1914, and 15 November, 1914, the said defendant sold said oysters as a dealer without State license, according to section 2411 of the Revisal, to parties in Swan Quarter, Hyde County. That before said defendant began to offer said oyters for sale, and between 5 April, 1914, and 15 November, 1914, he applied to the proper party for license, under said section of the Revisal, to sell said oysters, and that same was refused. That the defendant has not dealt in any oysters nor has he sold any oysters that did not come from the private oyster bed property, and has dealt in no oysters that came from the public grounds of the State of North Carolina.

" 'If upon these facts the court be of opinion that the defendant is guilty, we, the jury, find him guilty; but if the court be of opinion that he is not guilty, we find him not guilty.'

"Upon said special verdict found by the jury the court was of opinion that the defendant was not guilty, and adjudged that defendant be discharged."

The State excepted and appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Spencer & Spencer and Ward & Thompson for defendant.

HOKE, J. Section 2411 of the Revisal of 1905 provides for issuing license to persons engaged in the business of purchasing, canning, packing, shucking, or shipping of oysters, and directs that no such license shall be issued prior to 15 November and that same shall expire on 15 March following. Section 2395 makes it a misdemeanor for any one to engage in said business without having obtained the license as required.

The defendant, having sold oysters as a dealer and without having license so to do, comes directly within the terms and meaning of the law, and we see no valid reason why a verdict of guilty should not have been entered.

It is fully established that fish, including oysters and other shellfish, as well as game, being a valued source of food supply, come well within the police power of the State and are subject to rules and regulations reasonably designed to protect them and promote their increase and growth, and that such rules and regulations may not be set aside or ignored because they indirectly affect or trench upon some private rights that are or would be ordinarily recognized. *Daniels v. Homer,* 139 N. C., 219; *Rea v. Hampton,* 101 N. C., 51; *Patsone v. Pa.,* 232 U. S., 138; *Siltz v. Hesterberg, Sheriff,* 211 U. S., 31; *Lawton v. Steele,* 152 U. S., 142.

It is chiefly urged for defendant that a conviction should not be had because it appears that the dealer in this instance had procured the oysters from an individual owner of the oyster grounds; but the statute makes no such exception, and we are not aware of any principle sustaining the position. The provisions establishing a closed season and requiring dealers to operate only under a regular license are among the usual methods of regulating the industry, and it is well understood that the rights of individual owners are also subject to reasonable State regulations affecting their interests. *S. v. Sutton,* 139 N. C., 574; *S. v. Gallop,* 126 N. C., 983; 13 A. and E. (2 Ed.), pp. 573 *et seq.*

As a matter of fact, however, the rights of the individual owner are not involved in this case, and the State here is not undertaking to regulate his right to use or dispose of his property, but only the right of this defendant, a public dealer, to transact his business without license and in violation of positive law. True, it is said that he had applied for a license and been refused, but he applied at a time when the law provided that a license should not be issued. Revisal, sec. 2411. And, even if entitled thereto, he could not test his right by carrying on his business

without it, but he should have applied for mandamus compelling the oyster commissioner or other proper person to give him protection which he claimed the law and facts afforded. *S. v. Snipes,* 161 N. C., 242.

It was further contended that as section 2383 of Revisal as amended by chapter 967, 1907, and chapter 85, 1913, Gregory's Supplement, sec. 2383, only prohibited persons from buying or selling oysters from public grounds, this should be construed in connection with section 2395, with the effect that this latter section does not apply when oysters are shown to have been procured from private owners. But there is no necessary or essential connection between the two sections; the first applying to any and all citizens of the State and forbidding that they should buy or sell oysters taken from public grounds or natural beds during a closed season except in specified and very restricted instances, and the other being a law referring only to regular dealers in the oyster business, providing that they could only sell, etc., when regularly licensed to do so, and intended and reasonably designed to render more effective the legislation in protection of the fish and oyster industry of the State.

There is error, and this will be certified that, on the facts as established, a verdict of guilty should be entered.

Reversed.

STATE v. CLYDE KENNEDY.

(Filed 3 March, 1915.)

1. Appeal and Error—Evidence—Inferences—Homicide

On appeal by defendant charged with homicide, and convicted of murder in the second degree, the exclusion by the judge of the defense of manslaughter entitles the appellant to the benefit of every inference that the jury could have reasonably and fairly drawn from the evidence in his favor on that phase of the case.

2. Homicide—Provocation—Deadly Weapon—Evidence—Manslaughter.

On a trial for a homicide, evidence which tends to show that the deceased had first attacked the prisoner with a deadly weapon, a knife, resulting in his being killed by him, is sufficient for the consideration of the jury upon the question whether he fought in the heat of blood upon legal provocation, so as to reduce the degree of the homicide from murder to manslaughter, under the circumstances.

3. Homicide — Sudden Assault — Malice — Rebuttal — Trials — Questions for Jury.

Where the prisoner has been suddenly assaulted by the deceased with a deadly weapon, and the evidence in his behalf tends to show that the former thereupon took the latter's life, it is sufficient upon the question of whether the assault was calculated to so arouse his passion as to rebut the malice which would otherwise have made the killing a murder, and reduce the degree of the offense to manslaughter.

4. Same—Continued Assault—Appeal and Error.

One who is acting in self-defense in an assault made upon him with a deadly weapon, a knife in this case, may continue the assault on his part, if reasonably necessary to put himself beyond danger and to the extent that the circumstances, as they reasonably appeared, will justify him for that purpose; and where there is evidence tending to show that the party thus first assailed, seeing there was no way to further retreat, killed his assailant with a paling he had torn from a fence, by repeatedly striking him with it, after he had several times been cut, it is sufficient upon the question of manslaughter; and under such circumstances it is reversible error for the trial judge to withdraw that phase of the case from the jury, though this evidence conflicts with the testimony of the State's witnesses.

APPEAL by defendant from *Peebles, J.*, at September Term, 1914, of CRAVEN.

The prisoner, Clyde Kennedy, was indicted in the court below, with Alexander Curtis and Sidney Gautier, for the murder of E. W. Sarlandt, and all were convicted of murder in the second degree.

The court charged the jury, among other things, that there was no evidence of manslaughter in the case. In this connection it becomes necessary, and will suffice, to state only a part of the prisoner's own testimony, which is as follows: "I was sitting with my hat in my hands in this position, and he walked up and said, 'Your dog bit me,' and I said, 'It ain't nothing of the kind,' and he said, 'You're a G— d— liar; he did bite me.' I said, 'It ain't no such d— thing.' In the meantime, while I was sitting that way, he tried to hit me in the face. I jumped up and got a lick on my right shoulder. As I jumped up he kicked me; just did hit me back here. I asked him what he was trying to do—to kill me, or what. He set the bottle down, then came at me with his knife in his right hand and cut at me, and when I jumped back he kicked at me. As I was backing he still followed me up till I got to the side of the fence. He cut my shirt twice. I didn't know he cut my shirt; I had it open. The last time he cut me was just before I got the paling off. I felt something sting. I found out there was no way to get away, and grabbed the paling off the fence. He was about 2 feet from me when I broke the paling—coming to me all the time. He was cutting at me and kicking at me at the same time. I pulled the paling off the fence and the paling broke. I hit at him and I imagine I hit him about the face somewhere. I couldn't see, as it was dark out there. When he struck his knife in my hat—I went to pick up my hat after I had hit him. As I started to pick up my hat, he came at me again. He was right on me then. I didn't hit him then with the paling. He started back, and it looked as if he started to catch against the post. He fell on his side and he rolled over once or twice, and we all left there then. I made a remark that if I hadn't hit him with that paling he would have killed me." And again, on cross-examination, he testified: "I didn't do anything at all

with my left hand. Yes, the one hand was sufficient. I don't know where I hit him. I didn't hit him but once. I don't know that his skull was broken unless he did it when he came up against the bench. I don't know whether he broke it or not. I didn't hit him after he got on the ground. Mr. Rowe came along after we went off and came back. I didn't tell Mr. Rowe this man was trying to kill me, because I didn't think there was anything much the matter with him. If I had, I'd have tried to take him to the hospital or something. No, he wasn't lying on the ground until I hit him. He called me a G— d— liar. No, that didn't make me mad; I have taken d— liar before. It didn't make me mad, because I knew the man. It didn't worry me any. It didn't pass through my mind after he had called it. I said it wasn't any such d— thing. No, it didn't make me mad when he hit me. I tried to get out of his way, but I couldn't. He was standing like this: like this is the bench, and he was along here, and I was standing here. I was sitting like this, and he tried to hit me in the face, and then he kicked me and then kept on following me up with a knife. He wasn't so drunk. I couldn't have walked away. I don't say he would have killed me, but I would have been cut to pieces. I had to go about as far from here to the middle of that door to get the paling."

There was evidence on the part of the State which contradicted that of the defendant and tended to show that the prisoner was either the aggressor in the beginning of the difficulty or, if not, that he and the deceased cursed each other and both entered willingly into the fight, the deceased armed with a knife and the prisoner with the paling, with which he struck the deceased several blows both before and after he was prostrate on the ground.

Judgment was entered on the verdict, and the prisoner, Clyde Kennedy, appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

D. L. Ward and Kellum & Loughlin for defendant.

WALKER, J., after stating the case: We have not deemed it necessary to set out the entire evidence, but only so much as will present the merits of the exception taken to the charge of the court in regard to manslaughter, which, in our opinion, should be sustained. There was evidence in the case of murder in the first degree, murder in the second degree, manslaughter, and self-defense, and the court should have instructed the jury as to each offense and explained the law arising upon the evidence as properly applicable to each. As the judge excluded manslaughter from the case, the prisoner is entitled to the benefit of every inference that the jury could fairly and reasonably draw in his favor. The case is much

like that of *S. v. Curry,* 46 N. C., 280, where it appeared that two men were moving a boat up a river. They became involved in quarrel; one seized a pole and the other a boat-slide or piece of plank 8 feet long; the deceased gave the first blow by a stroke or punch with the pole (which had an iron spike at the end), making a bruise or puncture on the cheek of the prisoner and a bruise or cut over one of his eyes; the pole was broken by being struck against the side or bottom of the boat; the prisoner gave the deceased a blow with the slide on the head, by which he was knocked down upon the bottom of the boat; after he was down the prisoner continued to strike with the slide many times; how many blows he struck could not be determined; the deceased died twenty-four hours afterwards. A witness said he continued to strike from the time the witness's boat was 150 yards away until they were near enough for him to see that defendant was striking at deceased in the bottom of the boat—one boat floating down the stream and the other passing up to meet it. An examination of the body showed that the arms were bruised and one of them broken. The skull was fractured and there was blood over the brain. The head was bruised and bloody all over. The Court held that there was evidence of manslaughter. *Judge Pearson,* commenting upon the law as applied to the foregoing facts, condensed from the evidence in that case, said: "If two men fight upon a sudden quarrel, and one be killed, it is but manslaughter, although the death is caused by the use of a deadly weapon. But if, in such case, the killing be committed in an unusual manner, showing evidently that it is the effect of deliberate wickedness—malice, not passion—it is murder, although there be a high provocation. It is well settled that this is the general rule and the exception. His Honor was of opinion that the case under consideration fell within the exception, and the prisoner was guilty of murder. There was error." Again, referring to his own statement of the facts, as given above, he said: "Assuming these to be the facts, the question is, Does the case fall within any exception, so as to be murder and not manslaughter? Take a general view of the subject. If two men upon a sudden quarrel get into a fist fight, and one, without giving notice, draws a knife and stabs the other to the heart, or blows his brains out with a pistol, it is manslaughter, because, out of regard to the frailty of our nature, the killing is supposed to be the effect of passion, brought on by the high excitement of the fight. Does the case under consideration, where both parties seize upon weapons not prepared beforehand, but of a most unwieldy kind, and continue to use the same weapons throughout the conflict, bear any comparison in regard to its enormity with the cases of manslaughter stated above?" He then refers liberally to the authorities, *Rex v. Shaw,* 25 E. C. L., 443; *Watter's case,* 12 State Tr., 113, and gives illustrations therefrom as to what is a killing in an unusual manner that will rebut

the presumption that the slayer acted under provocation, and then proceeds to state the second exception, where, the provocation being slight, the killing is done with a degree of violence out of all proportion to it, this being murder, as it shows that he was not instigated by the provocation, but by malice and a wicked heart. But not so when two suddenly engage in a quarrel, and during the progress of the ensuing combat one draws a deadly weapon, taking no unfair advantage of his adversary, and slays him, or when there is a legal provocation, as in this case, the assault of E. W. Sarlandt with the knife, a deadly weapon, and, smarting under the provocation, the one assaulted draws a deadly weapon and kills his opponent, or when one assaults another in self-defense, but uses excessive force in doing so, under the supposed excitement of the conflict, the law, in all these cases, adjudges the killing to be manslaughter. The case last stated must be qualified by the statement that one who is acting in self-defense may continue the assault if reasonably necessary to put himself beyond danger and to the extent that the circumstances, as they reasonably appeared, will justify him for that purpose. But it is not necessary to enlarge upon these principles, except to add that, of course, although there be a provocation, it may be shown by evidence that the prisoner did not slay in consequence of it, but upon malice. This is laid down in *S. v. Smith,* 77 N. C., 488: "Homicide is murder unless it be attended with extenuating circumstances, which must appear to the satisfaction of the jury, and if the jury are left in doubt on this point, it is still murder. If A. assault B., giving him a severe blow, or otherwise making the provocation great, and B. strikes him with a deadly weapon and death ensues, the law, in deference to human passion, says this is manslaughter. If the provocation be slight, and it can be collected from the weapon used or any other circumstances that the prisoner intended to kill or do great bodily harm, and death follows, it is murder. The violence flows rather from brutal rage than human frailty. Foster's Cr. Law, 291." In *S. v. Charis,* 80 N. C., 353, it was said to be true, as a general rule, that where two men meet and fight upon a sudden quarrel, no advantage being taken, and one kill the other with a deadly weapon, it will be but manslaughter; and in such case it matters not which struck the first blow. The law presumes malice in every willful killing, and it is the provocation given in a mutual combat that extenuates the offense to manslaughter; therefore, in every case of killing upon sudden quarrel the grade of the crime depends upon the character of the provocation. If the provocation be great, it will be but manslaughter; but if slight, and the killing be done with a degree of violence out of all proportion to the provocation, it will be murder, citing *S. v. Curry, supra;* and these were recognized to be the exceptions to the rule, as stated by *Chief Justice Pearson* in that case: "(1) Where there is a strong provocation and the killing is in an

unusual manner, it is murder. (2) Where there is but slight provocation, if the killing be done with an excess of violence out of all proportion to the provocation, it is murder. (3) Where the right to chastise is abused, if the measure of chastisement or the weapon used is likely to kill, it is murder. See, also, *S. v. Hildreth,* 31 N. C., 429." The prisoner, Asbury Chavis, was convicted of murder, and the judgment was affirmed by this Court, upon the ground, though, that he and his associates had pursued the deceased upon slight provocation and brutally slain him, without any necessity of doing so. But *Judge Ashe* lays stress upon the absence of proof in that case that the deceased had delivered any blow with his weapon. He had a fence rail, but did not use it. We cannot forbear from stating, in substance, at least, what was said in *S. v. Tackett,* 8 N. C., 210: When the charge affirms "that a slight blow, not threatening death or great bodily harm, will not extenuate a homicide, if the weapon be a deadly one," it authorizes the inference that a blow, to constitute a legal provocation, must threaten death or great bodily harm. This, however, is no part of the description of a blow which all the authorities hold sufficient to extenuate; for, if it amount to a breach of the peace, and offer an indignity to the person receiving it, it is generally conceded that it will extenuate the homicide to manslaughter, although a deadly weapon be used. Accordingly, it is laid down by Hawkins: "If one man, upon angry words, shall make an assault upon another, either by pulling him by the nose or filliping him upon the forehead, and he that is so assaulted draw his sword and immediately run the other through, that is but manslaughter." The same passage is quoted with approbation by Kelyng, 135; and I take the sound principle to be that if any assault made with violence or circumstances of indignity upon a man's person be resented immediately by the death of the aggressor, and he who is assaulted act in the heat of blood and upon that provocation, it will be but manslaughter. When, therefore, a court is called upon to pronounce the general rule, it should be that "Words are not a sufficient provocation, but blows are a sufficient provocation to lessen the crime into manslaughter." *Taylor's case,* 5 Bur. Rep., 2796. Some cases, however, have been attended with peculiar circumstances, showing the necessity of a more critical and precise limitation of the rule. In those exceptional cases, *Stedman's case,* East's Cr. Law, 234, and *Rex,* 1 Strange, 499, where it was held to be murder, there were circumstances indicating deadly revenge or diabolical fury or evidence of protracted and unrelenting cruelty, and they are not really exceptions to the general rule, but come within the principle of the rule itself. And *Chief Justice Taylor* says regarding them: "But if in *Stedman's case* he had instantly, upon receiving the box on the ear, stabbed the woman, and the officer in the other case had stabbed Mr. Luttrell upon receiving the blow with the

cane, the cases must have been pronounced to be manslaughter." It is all based upon the notion that if, when one is assaulted, he instantly thereupon, before time has elapsed for reason to assume its sway, in the transport of passion thus excited, and without previous malice, returns the blow with a deadly weapon and kills his assailant, it will be manslaughter. *S. v. Hill,* 20 N. C., at p. 496. As was said in that case by *Judge Gaston,* this is not because the law supposes that this passion made him unconscious of what he was about to do, and stripped the act of killing of an intent to commit it, but because it presumes that passion disturbed the sway of reason, and made him regardless of her admonitions. It does not look upon him as temporarily deprived of intellect, and therefore not an accountable agent, but as one in whom the exercise of judgment is impeded by the violence of excitement, and accountable, therefore, as an *infirm* human being. We nowhere find that the passion which in law rebuts the imputation of malice must be so overpowering as for the time to shut out knowledge and destroy volition. All the writers concur in representing this indulgence of the law to be a condescension to the frailty of the human frame, which during the *furor brevis* renders a man deaf to the voice of reason, so that although the act done was intentional of death, it was not the result of malignity of heart, but imputable to human infirmity. We are not speaking here of those assaults which, being of a deadly character, permit of different conduct on the part of the assailed, and which the law will view with greater leniency. It was held in *S. v. Hale,* 9 N. C., 582; *S. v. Cæsar,* 31 N. C., 391, and *S. v. Miller,* 112 N. C., 878, that "whenever force is used upon the person of another, under circumstances amounting to an indictable offense, such force is a legal provocation." It does not necessarily excuse or justify a killing, as that will depend upon the character of the force used, and the surrounding circumstances, but it may extenuate by reducing the crime to a lower grade than murder. The above definition of a legal provocation is not intended to imply that an act must be indictable before it can become a legal provocation (*S. v. Wiel,* 18 N. C., 121), for it is not thus restricted in its application, as will appear from that decision.

In this case, if the facts are as stated by the prisoner in his testimony, and by those witnesses who corroborated him, he was assaulted by the deceased with a knife and was cut, and the deceased continued to press upon him while he was backing away, and not until he thought he was in danger of life or limb did he use the plank which he had jerked from the fence. This was calculated to arouse his passion and to dethrone his reason and to rebut the malice which otherwise would have made the killing a murder, and he was entitled to have this phase of the evidence submitted to the jury, with proper instructions. It does not prevent a conviction for murder, for the jury may find that is not true, but that he

acted from malice, which the law implies from use of a deadly weapon, or even with deliberation and premeditation.

The views we have expressed are strongly supported, we think, by *S. v. Curry, S. v. Miller,* and the other cases above cited, and also by the following: *S. v. Floyd,* 51 N. C., 392; *S. v. Ellick,* 60 N. C., 629; *S. v. Massage,* 65 N. C., 480; *S. v. Harman,* 78 N. C., 515; *S. v. Kennedy,* 91 N. C., 572; *S. v. Exum,* 138 N. C., 599; *S. v. Baldwin,* 152 N. C., 822; *S. v. Yates,* 155 N. C., 450.

In *Baldwin's case Justice Hoke* said: "Manslaughter is the unlawful killing of another without malice, and under given conditions this crime may be established, though the killing has been both unlawful and intentional. Thus, if two men fight upon a sudden quarrel and on equal terms, at least at the outset, and in the progress of the fight one kills the other—kills in the anger naturally aroused by the combat—this ordinarily will be but manslaughter. In such case, though the killing may have been both unlawful and intentional, the passion, if aroused by provocation which the law deems adequate, is said to displace malice and is regarded as a mitigating circumstance reducing the degree of the crime."

Upon a careful review of the case, our conclusion is that the court erred in excluding from the consideration of the jury the view which was presented as to manslaughter. There are other serious questions raised by the exceptions, but they may not be again presented, and, therefore, require no consideration now.

New trial.

STATE v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 10 March, 1915.)

1. Intoxicating Liquors—Federal Statutes—Constitutional Law.

Chapter 90, Federal Statute Anno. Supp. 1914, p. 208, known as the Webb-Kenyon law, is not in contravention of the Constitution of the United States, and is a valid congressional enactment.

2. Intoxicating Liquors — Commerce — Constitutional Law — Persons Interested.

The act of Congress known as the Webb-Kenyon law classifies interstate shipments into legal and illegal, and withdraws all shipments into prohibition territory from other States from the effect and operation of the commerce clause of the Federal Constitution which are made with the intent to violate the prohibition laws, the illegal intent of any person interested therein, made determinative by the law, being that of the consignee or other person interested in the "article" transported.

3. Intoxicating Liquors — Federal Statutes — Police Powers — State Lines — State Regulations.

The act of Congress known as the Webb-Kenyon law is interpreted with regard to its language and the facts and circumstances attendant on

its passage which throw light on its meaning and purpose, including also the significance and history of precedent legislation, and, thus construed, it is *Held*, that such shipments made illegal by this statute are brought within the police power of the State when and as soon as they cross the State line, and are subject to such rules and regulations as are reasonably designed to make such power effective.

4. Intoxicating Liquors — Federal Statutes — Police Powers — Incidental Powers.

The Webb-Kenyon law having conferred upon the States the power to regulate, under their police powers, the sale of intoxicating liquors within their prohibition territory, so far as the Federal commerce is concerned, the grant of this power carries with it the authority to do all things necessary to accomplish the expressed purpose of the grant.

5. Intoxicating Liquors—Federal Statutes—State Statutes—Carriers of Goods —Books for Inspection—Criminal Laws.

Chapter 44, Public Laws 1913, known as the "search and seizure law," entitled "An act to secure the enforcement of the laws against the sale and manufacture of intoxicating liquor," making unlawful, by section 1, the sale, exchange, or bartering, etc., of such liquors, and, by section 2, keeping them in possession for the purpose of sale; and making the possession thereof in certain quantities, varying with the kinds, *prima facie* evidence of the violation of its second section, after establishing certain methods of procedure for the enforcement of these sections, required railroads and other common carriers "to keep a separate book in which shall be entered immediately upon receipt thereof the name of the person to whom the liquor is shipped, the amount and kind received," etc., which shall be open for inspection to any officer or citizen of the State, during business hours, etc., and enacting that "said book shall constitute *prima facie* evidence of the facts therein," etc., is held to be enforcible under the provisions of the Webb-Kenyon law, and the refusal by the agent of the carrier to a citizen of this State an inspection in the manner authorized by the statute makes him guilty of a misdemeanor, as therein declared.

6. Same—Commerce—Regulations—Interstate Commerce Commission—Judicial Notice—Burden on Commerce.

The State court will take judicial notice of the regulations by the Interstate Commerce Commission of common carriers, regarding the commerce clause of the Federal Constitution made in pursuance of an act of Congress; and it is held that chapter 44, Public Laws 1913, requiring the carriers to keep a record of intoxicating liquors, names of consignees, etc., in this State, cannot be construed as a burden upon interstate commerce, the book being only an excerpt from the books which the carrier is required by the Interstate Commerce Commission to keep, but is only a reasonable police regulation, necessary to the effective regulation and control of a subject submitted to the State by the Federal law.

7. Intoxicating Liquors—Carriers of Goods—Federal Statutes—Commerce—Disclosures Forbidden—Legal Process.

The Federal statute forbidding disclosures by the carrier as to interstate shipments without consent of the shipper, which may be used by competitors to the shipper's disadvantage, by express terms excludes such information given in response to any legal process authorized by any State or Federal court, or to any officer or other duly authorized person seeking such information for "persons charged with or suspected of crime," etc., and our statute, chapter 44, Public Laws 1913, requiring that the railroads, during business hours, permit any citizen of the State to

inspect the company's book, showing the receipt, etc., of intoxicating liquors, comes directly within the intent and meaning of the Federal law.

8. Intoxicating Liquors — Federal Criminal Code — Commerce — Conflicting Laws—Later Enactments.

Chapter 44, Public Laws 1913, requiring that the name of the recipient of intoxicating liquors be signed on the books, etc., which is an addition to the requirements of the Federal Criminal Code, secs. 238 and 239, is not in conflict therewith, and if it were otherwise, the Webb-Kenyon law, being later enacted and giving the State authority to enact a valid statute on the subject, is controlling.

9. Appeal and Error—Defendant's Appeal—Adverse Judgment.

No appeal lies for defendant in a criminal case except from a judgment on conviction, etc., and final in its nature, and in this case the appeal of defendant is dismissed without prejudice to its rights to have its position considered and its rights made available by proper appellate procedure on the entry of judgment below.

APPEAL by the State from *Bond, J.*, at July Term, 1914, of WAKE.

Indictment for refusing to allow an inspection of certain books containing a record of shipments and deliveries to consignees of intoxicating liquors in violation of Public Laws 1913, ch. 44, sec. 5.

It appeared that the defendant had such a book as the statute requires it to keep, and the relevant facts embodied in a special verdict and the proceedings thereon are as follows:

"We, the jurors sworn and impaneled in this case, return the following special verdict in this case, the defendant having agreed that a special verdict might be found:

"We find that R. L. Davis, on a date prior to the starting of this prosecution, he being at that time a citizen of the county of Wake, State of North Carolina, went to the office of the defendant company during its business hours and while said office was open, and demanded of the agent that he be allowed to inspect the book kept by the defendant showing shipments of liquor from points outside of the State of North Carolina to the city of Raleigh.

"We further find that the said Davis was not an officer.

"We further find that the agent of the defendant stated that he was instructed to and did refuse to allow the said Davis to make the inspection which he had requested and demanded.

"We further find that the said Davis had no legal process and did not make any demand under any legal process, and at the time of the alleged demand he was neither a State nor Federal officer of any kind of any State or Territory.

"We further find that at the time the said Davis made such demand he was seeking information from said book for the purpose of prosecuting persons suspected of violating the law of North Carolina.

"We further find that at the time said demand was made that said Davis was seeking general information as to shipments of whiskey into

the city of Raleigh from points in another State, and that he had in his mind specially an effort to see what evidence could be procured against one or more specific parties in the city of Raleigh, meaning by the words 'general information' that he was seeking to ascertain who were the consignees of liquor and the quantities they were receiving, for the purpose of prosecuting such parties as may be charged or suspected with the violation of the prohibition laws of the State.

"We further find that the witness R. L. Davis, at the time he made a demand for an inspection of the book, had no authority except that which existed, if any, by virtue of the fact that he was at that time a citizen of the State.

"If upon the foregoing facts the court is of the opinion that the defendant is guilty, then we say for our verdict that the defendant is guilty; if upon said facts the court is of the opinion that the defendant is not guilty, then we find that the defendant is not guilty."

Upon the rendering of the foregoing special verdict the defendant Seaboard Air Line Railway moves for judgment of not guilty upon the special verdict, because the facts stated therein do not constitute a violation of the law, and upon the ground that the statute upon which the action is based is an attempted regulation of interstate commerce in violation of Article I, section 8, of the Constitution of the United States, and is unconstitutional and void, and for the reasons fully set out in the foregoing written motion to dismiss the action and for judgment of nonsuit.

Upon the foregoing special verdict the court adjudged that the defendant is not guilty. The State excepts.

And thereupon the jury for their verdict say the defendant Seaboard Air Line Railway is not guilty.

Motion by the State to set aside the verdict and for a new trial. Motion overruled, and the State excepts.

Whereupon it is considered and adjudged by the court that the defendant, the said Seaboard Air Line Railway, be discharged.

To the foregoing judgment the State again excepts and appeals to the Supreme Court.

Defendant also appealed in the case and assigned for errors the refusal of the court to quash the bill of indictment and to dismiss the action, these motions having been duly made in apt time and for reasons stated in the record.

Attorney-General Bickett and Assistant Attorney-General Calvert and Manning & Kitchin for the State.

Murray Allen for defendant.

HOKE, J. It has now for some years "been the settled public policy of this State, approved by popular vote and enforced by general and many

local statutes, that except in certain specified and very restricted instances the manufacture and sale of intoxicating liquors shall not be allowed." *Smith v. Express Co.,* 166 N. C., 155.

Acting, no doubbt, under the conviction that where such a policy has been established as necessary to the peace and well ordered progress of communities the people are entitled to have the same upheld, and recognizing that its successful maintenance and efficient enforcement is seriously hindered and at times obstructed by reason of interstate shipments of whiskey, and because such shipments were withdrawn to a great extent from State regulation by the commerce clause of the Federal Constitution, Congress has, from time to time, enacted statutes designed to bring this subject, the sale, disposition, and use of intoxicating liquors, more and more under the police power of the States. Thus, in 1890, not long after the decision of the Supreme Court of the United States in *Leisy v. Hardin,* 135 U. S., 100, in which it was held that, notwithstanding the prohibition statutes of a State to the contrary, an importer could ship whiskey into the State and sell same in original packages, Congress passed a statute known as the Wilson law, to the effect that all fermented, distilled, or intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, or storage, shall, on arrival in such State or Territory, be subject to the operation and effect of the laws of such State, etc., and shall not be exempt therefrom by reason of being introduced therein in original packages. This statute was upheld as a valid enactment in *In re Rahrer,* 140 U. S., 545, and in *Rhodes v. Iowa,* 170 U. S., the terms "on arrival in such State or Territory" were construed to mean "when delivered to consignee in said State in continuous shipment from another State or Territory," the Court being of opinion, on perusal of the entire statute, that its purpose and meaning was to enable the States to prohibit sales in original packages after delivery to consignee.

In these and other cases on the subject clear intimation is given that Congress might, by additional legislation, further extend the police power of the State over the subject. Thus, in *Rahrer's case Chief Justice Fuller,* delivering the opinion, said: "No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so." And, in *Leisy v. Hardin,* the Court, in referring to the case of *Bowman v. R. R.,* 125 U. S., 507, in which it had been held that, under the laws then existent, interstate shipments of whiskey were excluded from State regulation by the commerce clause of the Federal Constitution until delivery in continuous transit to the consignee, said: "Up to that time we hold that, *in the absence of congressional permission to do so,* the State had no power to interfere by seizure or any

other action in prohibition of importation and sale by the foreigner or nonresident importer," a statement given with approval in *Rhodes v. Iowa, supra,* 417.

In accord with these intimations, Congress, on 1 March, 1913, ch. 90, Federal Statutes, Anno. Supp., 1914, p. 208, passed the act known as the Webb-Kenyon law. It is entitled "An act divesting intoxicating liquors of their interstate character in certain cases," and provides, in general terms, that the shipment or transportation in any manner or by any means whatsoever of any spirituous, vinous, malted, fermented, or any intoxicating liquor of any kind from one State or Territory into another, etc., which said intoxicating liquor is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State or Territory, etc., is hereby prohibited.

We are not aware that the validity or interpretation of this statute has been directly presented for decision to the Supreme Court of the United States, but the question, in different phases, has been before several of our State courts and the lower Federal courts of recognized ability and learning, and there is a very general consensus of opinion, in which we fully concur, that the act is constitutional; that it classifies interstate shipments of intoxicating liquors into legal and illegal, withdrawing from the effect and operation of the commerce clause of the Federal Constitution all such shipments into prohibition territory with intent to violate the laws thereof, and, in view of the better considered cases, that the illegal intent of any "person *interested therein*," made determinative by the law, is an intent on the part of the consignee or others interested in the "article" transported. *Smith v. Express Co.*, 166 N. C., *supra;* concurring opinion of *Chief Justice* in *S. v. Cardwell*, 166 N. C., 316; *Adams Express Co. v. Commonwealth*, 154 Ky., 462; *Atkinson v. Express Co.*, 94 S. C., 444; *S. v. Express Co.*, 145 N. W., 145 (Iowa); *Van Winkle v. State* (Del.), 91 Atl., 385; *American Express Co. v. Beer* (Miss.), 65 So., 575; *Ex parte Peede* (Texas Crim. App.), 170 So., 749. And, having regard to the language of the law and the facts and circumstances attendant on its passage and throwing light on its meaning and purpose, including also the significance and history of precedent legislation, we are of opinion further that all such shipments made illegal by the Webb-Kenyon law are brought within the police power of the State when and as soon as they cross the State line, and are subject to such rules and regulations as are reasonably designed to make such power effective. This position is stated by *Smith, C. J.*, delivering the opinion in *Express Co. v. Beer*, as follows: "The next statute of this character enacted by Congress was the one here under consideration, the Webb-Kenyon act, and a comparison of its language with that of the Wilson act will demonstrate that its draftsman intended to cure the

defect in the Wilson act and to make it unlawful to transport into a State from without intoxicating liquors intended by any person interested therein to be dealt with contrary to the laws of the State; in other words, to divest such intoxicating liquor altogether of its interstate character, and thereby permit the laws of the State into which it was being transported to operate upon it immediately upon its crossing the State line. . . ."

About the time the Webb-Kenyon law was enacted, and with the view of its successful passage, the Legislature of North Carolina enacted a statute entitled "An act to secure the enforcement of the laws against the sale and manufacture of intoxicating liquors," being chapter 44 of Public Laws of 1913, and popularly known as the search and seizure law, which, in section 1, prohibits the sale, exchange, or barter, etc., of such liquors, and section 2 prohibits the keeping such liquors in possession for the purposes of sale, and makes the following facts *prima facie* evidence of a violation of the second section:

"First. The possession of a license from the Government of the United States to sell or manufacture intoxicating liquors; or

"Second. The possession of more than 1 gallon of spirituous liquors at any one time, whether in one or more places; or

"Third. The possession of more than 3 gallons of vinous liquors at any one time, whether in one or more places; or

"Fourth. The possession of more than 5 gallons of malt liquors at any one time, whether in one or more places; or

"Fifth. The delivery to such person, firm, association, or corporation of more than 5 gallons of spirituous or vinous liquors, or more than 20 gallons of malt liquors within any four successive weeks, whether in one or more places; or

"Sixth. The possession of intoxicating liquors as samples to obtain orders thereon," etc.

After establishing certain methods of procedure for the enforcement of these sections, the act, among other things, and in section 5, makes provision as follows: "All express companies, railroad companies, or other transportation companies doing business in this State are required hereby to keep a separate book in which shall be entered immediately upon receipt thereof the name of the person to whom the liquor is shipped, the amount and kind received, and the date when received, the date when delivered, by whom delivered, and to whom delivered, after which record shall be a blank space, in which the consignee shall be required to sign his name, or, if he cannot write, shall make his mark in the presence of a witness, before such liquor is delivered to such consignee, and which said book shall be open for inspection to any officer citizen of the State, county, or municipality any time during business hours of the company, and said book shall constitute *prima facie* evidence of the facts

therein and will be admissible in any of the courts of this State. Any express company, railroad company, or other transportation company or any employee or agent of any express company, railway company, or other transportation company violating the provisions of this section shall be guilty of a misdemeanor. . . ."

There are facts in the special verdict showing that defendant, having kept the book as specified and required by the law, refused, during business hours, to permit R. L. Davis, at the time a citizen and resident of Wake County, N. C., to inspect such book, and that said Davis was seeking information from said book for the purpose of prosecuting persons suspected of violating the laws of North Carolina. This refusal is made a misdemeanor by the statute, and, on the record, there should be a conviction of defendant if this is a valid law. It has been so recognized with us in *S. v. Wilkerson*, 164 N. C., 431, and in *S. v. Lee*, 164 N. C., 533, and, on these and other authorities applicable, we are of opinion that the court below erred in directing that a verdict of not guilty should be entered.

It is chiefly urged against the validity of the statute and the attempted procedure under it that spirituous liquors, in certain instances, being still recognized as a legitimate subject of interstate commerce, is protected from such interference by the commerce clause of the Federal Constitution and authoritative decisions construing it, and that such protection continues until a given shipment is delivered to the consignee in a continuous course of transit, citing, among other cases, *McNeil v. So. Ry.*, 202 U. S., 543; *Leisy v. Hardin*, 135 U. S., 100; *Bowman v. R. R.*, 125 U. S., 465, and other cases.

Prior to the enactment of the Webb-Kenyon law this position might very well have been recognized as controlling; but it is an established principle that, when a statute contains a definite grant of power, it will be so construed as to authorize all things necessary to accomplish the expressed purpose of the grant. *Dewey v. R. R.*, 142 N. C., at page 400, citing Sutherland on Statutory Construction, secs. 341-43, pp. 427 *et seq.* (erroneously printed in *Dewey's case* as p. 578), and Enlich on Interpretation of Statutes, sec. 418. And this statute, as we have endeavored to show, having made certain interstate shipments of intoxicating liquors illegal and brought the same within the police power of the State as soon as they come within its territory, should be held to confer upon the State authorities the right to make the rules and regulations required and reasonably designed to make such power effective. The Wilson act, as we have seen, brought these liquors under State control as soon as delivered to the consignee, and to hold, as defendant contends, that the Webb-Kenyon act did no more than this would be to deprive the written statute, enacted after full and extensive discussion and passed over a President's veto, of any and all significance. And to set aside a regulation of this

character, intended and reasonably calculated to enable the State's officers and agents to ascertain whether interstate shipments of whiskey are or are not within State control and subject to State regulation, would well-nigh render the statute of no practical value to the communities it was intended to benefit. The regulation now objected to puts no burden on interstate commerce, but is only a police regulation, reasonably designed to carry out the purpose of the statute and make effective the power referred to the State by reason of the Federal enactment, and comes well within the principle on which quarantine and inspection and other State and local laws and regulations are based and upheld, many of them stated with approval in the *Minnesota rate cases,* 230 U. S., pp. 352, 402, 406, 408; *Mo. Pac. Ry. v. Lanabee Mills,* 211 U. S., 612, 622, and other cases of like purport.

It is further contended not only that this State legislation invades a field exclusively referred by the Constitution to Federal regulation, but that, on this particular subject, Congress has specially acted, and that this State legislation is in direct violation of the Federal statute intended to control the matter, and by which interstate carriers are prohibited from keeping any "accounts, records, or memoranda other than those prescribed by the Interstate Commerce Commission, sec. 20 of the Act to Regulate Commerce, ch. 104, sec. 20, Laws U. S., 1887, and amendments thereto in sec. 8592, 4 Compiled Statutes U. S., pp. 3872 and 3873.

If it be conceded that there is direct conflict between the State statute and the provision of the Federal law concerning this subject, and we are right in the position that, when Congress made certain interstate shipments of intoxicating liquor illegal and referred the regulation thereof to the police power of the States, it thereby granted the incidental right to make this power effective, in that case the Webb-Kenyon law, being the later expression of the congressional will, might very well be construed to modify to that extent the former Federal laws and regulations on the subject. But, in fact, there is no conflict. Taking judicial notice of the regulations of the action of the Interstate Commerce Commission, which we are permitted to do, when the regulations of an important governmental department, made pursuant to a public statute and designed and intended to control the general public, have the force of a public law (*S. v. R. R.,* 141 N. C., 846), we know that, pursuant to this public statute, the Interstate Commerce Commission have required interstate carriers to keep a standard and uniform set of books, showing the movements of traffic, and that it is done with a view to facilitate examination by official agents and to remove or minimize as far as possible the opportunity to discriminate among shippers, and there is nothing in this State statute that in any way militates against the requirement or purpose of such a regulation. The book required by the State law is simply an excerpt from the books which the carrier is required by the Commission

to keep keep, and, recognizing this, the facts show that the defendant had actually kept the book in this instance. Being, as stated, only an extract from the carrier's general records, such a book is no burden on commerce, but only a reasonable police regulation, necessary to the effective regulation and control of a subject submitted to it by the Federal law.

We were referred on the argument to a Federal statute, 36 St. L., 553; 1 Fed. St., Anno. Supp., 1912, p. 122, 4 Compiled St., sec. 8583, subsec. 6, that which forbids disclosures as to interstate shipments without consent of the shipper, which may be used by competitors to the shipper's disadvantage. If it be assumed that this statute is otherwise relevant, the act itself contains the proviso: "That nothing in this act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any State or Federal court or to any officer or agent of the United States or of any State or Territory in the exercise of his powers, or to any officer or other duly authorized person seeking such information for persons charged with or suspected of crime," etc.

The State statute provides that the book required to be kept shall be open to any officer or *citizen* of the State during business hours, and this constitutes any citizen an authorized agent of the State for the purpose indicated, bringing the applicant, in the present instance, R. L. Davis, directly within the intent and meaning of the proviso in the Federal law.

It is well understood that offenders against regulations of this character are insistent, enterprising, and elusive, and we see no reason why the State should not commit the duty to any of its citizens as being required to a proper enforcement of the law on the subject.

The matter having been referred to the police power of the State, the question of method must be left largely to the State's discretion—entirely so, unless the regulation should offend against some constitutional principle. The one in question here, as we have endeavored to show and owing to the Webb-Kenyon act, is not within the commerce clause of the Federal Constitution; no more is it inhibited by the fourteenth amendment, which has been repeatedly held not to impair the exercise of the police power (*In re Converse*, 137 U. S., 624; *Barbier v. Connolly*, 113 U. S., 27), and the provision constituting any citizen an authorized agent of the State for the enforcement of the law is not near so searching or stringent as many police regulations which have been approved by the courts. *Patson v. Pa.*, 232 U. S., 138; *Silz v. Hesterburg*, 211 U. S., 31; *Lawton v. Steele*, 152 U. S., 133. This last upholding a law of New York which authorized *any person* to destroy fish nets set or maintained on the waters of the State in violation of the State statutes, a principle applied in our own State in *Daniels v. Homer*, 139 N. C., 219. There are also many decisions sustaining legislation by which the production and examination of books have been compelled and provided for. *Inter-*

state Commerce Commission v. Baird, 194 U. S., 25; *In re Chapman,* 166 U. S., 661; *Santa Fe R. R. v. Davidson,* 149 Fed., 603. And it will be noted further that the State statute, section 7, contains provision that no person testifying shall be prosecuted for any offense done or participated in by him, nor shall any discovery made by such witness be used against him in any penal or criminal action.

In this connection we were cited by counsel for defendant to the case of *Ezell v. City of Atlanta,* 140 Ga., 197, in which a municipal ordinance of the city, requiring carriers, on receipt of spirituous liquors, etc., to make out a list and report same to the police authorities, was declared void by the Supreme Court of Georgia. This decision was made on the ground that the ordinance in question was an unwarranted interference with interstate commerce and in violation of section 20 of the Interstate Commerce Act and the amendments to the same. The requirements of the said ordinance are much more elaborate and exacting than the provision of the State statute which we are considering, and the same might be distinguished on the ground that the ordinance amounted to a burden on interstate commerce. The case, however, was presented on facts occurring before the passage of the Webb-Kenyon law, and the Court is careful to note that the effect of that law on the question was in no wise considered.

It was finally insisted that the State statute is in conflict with the Federal Criminal Code, secs. 238 and 239, on the ground that the first prohibits delivery of these shipments to any one but the consignee or on his written order, whereas the State law requires, in addition, that the name of the recipient shall be signed in the book, etc., and the second, in effect, forbids the shipment of whiskey c. o. d. But it will be observed that both of these provisions of the Federal Code are prohibitive in character and the subsequent Federal legislation, having made certain shipments of whiskey illegal and placed them under the police power of the State, including the right to make all rules and regulations concerning them reasonably required to make its control effective, there is nothing to prevent the State from making further regulations on the subject which do not conflict, but are in addition to the Federal requirements.

For the reasons stated and on the facts established, we are of opinion that the court below should have held the defendant guilty.

This will be certified, that a general verdict of guilty be entered below and the court proceed to judgment.

Reversed.

DEFENDANT'S APPEAL.

HOKE, J. It is the established position with us that no appeal lies for defendant in a criminal case except from a judgment on conviction or plea of guilty or some judgment against him in its nature final. *S. v.*

Ford, present term; *S. v. Andrews,* 166 N. C., 349; *S. v. Webb,* 155 N. C., 426. The appeal of the defendant, therefore, must be dismissed, but without prejudice to the right to have its positions considered and its rights made available by proper appellate procedure on the entry of judgment below as indicated in the State's appeal.

Appeal dismissed.

STATE v. E. W. WADE AND PEARLIE WADE.

(Filed 17 March, 1915.)

1. Criminal Law—Fornication and Adultery.

Connected and relevant circumstances leading up to and tending to show the guilt of the parties charged with fornication and adultery are competent to be submitted to the jury as evidence of the offense charged, as where a married man does not provide for his wife and children or live with them, but lives with an unmarried woman on his own lands, eats with her, works in the field with her, illegitimate children are born to her under such circumstances, who call the man their father.

2. Same—Two Years—Former Relations—Evidence.

The fact of fornication and adultery of the parties charged with this crime may only be shown within two years before the issuance of the warrant, but improper relations of this character theretofore existing is competent evidence as explanatory of their continued relationship within that period.

3. Appeal and Error—Trials—Broadside Exceptions — Instructions—Special Requests.

A general exception to the charge of the judge to the jury, without particularizing the errors complained of, will not be considered on appeal; and where the exception is to the failure of the trial judge to instruct more fully, in his general charge, upon certain phases of the evidence in the case, it can only be made available when special and proper requests were tendered in time and refused by the court.

4. Criminal Law—Fornication and Adultery—Existing Marriage—Evidence.

Upon a trial for the criminal offense of fornication and adultery, it is competent to show that the husband had a living wife from whom he had not been divorced, as bearing upon the charge in the indictment that the defendants were not married to each other.

APPEAL by defendant from *Daniels, J.,* at January Term, 1914, of LENOIR.

Attorney-General Bickett for the State.
Rouse & Land for defendants.

WALKER, J. The defendants, E. W. Wade and Pearlie Wade, were indicted for fornication and adultery, and from the judgment upon a

verdict of guilty as to the male defendant he appealed to this Court. There were circumstances from which the jury might have inferred his guilt, and evidence of this kind is sufficient to support a conviction. *S. v. Poteet,* 30 N. C., 23; *S. v. Eliason,* 91 N. C., 564; *S. v. Rinehart,* 106 N. C., 787. The judge permitted the State to prove that defendant had separated from his wife and failed to support her and her children, who were begotten by him, for ten or twelve years, and, in the charge, he stated that the prosecution relied upon that circumstance as one to be considered by the jury in passing upon the defendant's guilt; but this was not irrelevant, as urged by the defendant, and was not introduced by the State for the purpose of contending that because guilty of the offense of abandoning his family, he was also guilty of this offense. It was a circumstance leading up to his immoral and illicit relations with his codefendant, and the first link in the chain of evidence pointing to his guilt. If he had been a faithful and dutiful husband and father, instead of deserting his home and seeking another where his paramour lived with him, this charge would never have been made against him. The case states: "That the defendant is a married man; that he has a wife and children living upon an adjoining plantation; that the other defendant is a single woman; that for ten or twelve years she has been living in his house or upon the land rented by him; that he does not support his family—his wife and children; he leaves that to his father-in-law; that they (defendants) have been seen about his place together; that she is seen cooking and washing at a place rented by him; that they eat at the same table; that they work in the fields together; that during the time that she has lived upon his premises she has given birth to five illegitimate children; that these children have been seen crawling to his lap and calling him papa." It was competent, of course, to show that the defendant was a married man, and had not been divorced, but had merely separated from his wife, as it tended to prove an allegation of the indictment, that the two defendants were not married to each other, as they could not be, under such circumstances. *S. v. Martin,* 95 N. C., 66. If a married man with children abandons his family and consorts with a loose woman, whose lewd character is shown by her having had five children by him, all of whom he recognizes as his own offspring and fondles with affection, and by whom, from time to time, he is called "father," and he continues to live under the same roof with their mother, in close proximity, working and eating with her, spending his money on her and not on the support of his wife and legitimate offspring, it is not a strained deduction from these facts that he has continued her in his service as his mistress. *S. v. Chancy,* 110 N. C., 507.

Underhill in his work on Criminal Evidence (sec. 381) says: "Direct evidence of the act of sexual intercourse can seldom be obtained. Hence, evidence of all the circumstances of the parties, their relations to one

another, their domestic and social surroundings, their acquaintance, conduct and familiarity, the facts that they went out together and visited each other, and often expressed a desire to be together, are relevant. Improper familiarities and adulterous acts between the same parties prior to or subsequent to the act charged, but not too remote, or, if remote, connected with it so as to form a part of a continuous course of conduct, may be shown for the purpose of bringing out the relations and adulterous disposition of the defendant." The Supreme Court of Michigan, in *People v. Jenness,* 305, at page 322, says that in the case of an indictment for this offense, "previous familiarity, and the general or habitual submission of the female to his (the defendant's) sexual embraces, must, in the nature of things, tend to render it more probable that like intercourse took place on the occasion charged. Such is the force and ungovernable nature of this passion, and so likely is its indulgence to be continued between the same parties, when once yielded to, that the constitution of the human mind must be entirely changed before any man's judgment can resist the force of such an inference to be drawn from previous acts of intercourse." These extracts, and the many cases cited in the notes to section 381 of Underhill on Cr. Evidence, show what great stress some of the courts have laid upon the fact of previous sexual intercourse as an important probative one; but this Court has held that such evidence is merely explanatory of acts and conduct within the two years, though the jury must find that the crime was committed within that period (*S. v. Guest,* 110 N. C., 410), and it was so treated by the presiding judge.

Defendant complains that the charge did not state his contentions fully and impartially, but laid more stress on those of the State. We have read the charge most carefully and have been unable to discover this fault. It appears to us to have been fair and just, clear and comprehensive, and arrayed the facts, which the evidence tended to prove, with perfect discrimination and proper application to the different phases of the case, giving to each side equal consideration. But if there had been any such omission, as is alleged by the defendant, it was his duty to call the attention of the court to it, by a request for more specific instructions, so that the judge could state his contentions more definitely and accurately. *Jeffreys v. R. R.,* 158 N. C., 215; *S. v. Cox,* 153 N. C., 638; *S. v. Blackwell,* 162 N. C., 672. The exceptions directed against the general structure of the charge cannot be entertained, as the particular error must be pointed out. A "broadside" attack upon the charge is not permissible. *S. v. Johnson,* 161 N. C., 264; *S. v. Cameron,* 166 N. C., 379. The judge sufficiently instructed the jury that the illicit association of defendants more than two years before this prosecution was commenced could only be considered as explanatory of what occurred since, and in this respect complied with the rule of this Court. 164 N. C., 548.

The evidence was sufficient to convict. *S. v. Chancy,* 110 N. C., 507; *S. v. Rinehart, supra.*

We have considered the positions taken by the defendant's counsel in their well prepared brief, but have concluded that the trial was conducted in all respects according to law.

No error.

STATE v. I. W. BRIDGERS.

(Filed 17 March, 1915.)

Criminal Law—Concealed Weapons—"His Own Premises"—Interpretation of Statutes.

A superintendent or overseer of a department of a cotton mill, in this case a carding room, is not, while therein, "on his premises," within the meaning of Revisal, sec. 3708, prohibiting the carrying of concealed weapons; and where such person has carried a pistol concealed on premises of this character, especially when he does so in anticipation of a difficulty with another employee therein, he is indictable for the offense prohibited by the statute.

APPEAL by defendant from *Peebles, J.,* at January Term, 1915, of LENOIR.

Attorney-General for the State.
Rouse & Land for defendant.

CLARK, C. J. The defendant was indicted for carrying a concealed weapon (a pistol) off his own premises. Revisal, 3708. The only question raised is whether the defendant, who was overseer or superintendent of the carding room of the cotton mills, was "on his own premises," within the meaning of the statute.

In *S. v. Perry,* 120 N. C., 580, it was held that the superintendent of a turnpike company is not, when on such turnpike, within the exception, although he was in absolute control of all the property of the company. The Court said: "The use of the words, 'on his own premises,' and being 'not on his own land,' shows an intention to restrict the right to carry concealed weapons to those who are in the privacy of their own premises, where they are not likely to be thrown in contact with the public nor tempted, on a sudden quarrel, to use to the detriment of others the great advantage a concealed weapon gives to one who unexpectedly pulls it out upon his defenseless neighbor." And the Court further said: "The statute clearly does not contemplate that in the crowded cars and thoroughfares the corporation officials shall have leave to carry concealed weapons about their persons, while all other citizens traveling thereon dare not do the same, under fear of criminal punishment."

S. v. Terry, 93 N. C., 585, and *S. v. Deyton,* 119 N. C., 880, hold that an employee who carries a concealed weapon on the premises of his employer is indictable. In *S. v. Terry* it was held that it is not necessary that the legal title to the land should be in the defendant, when he is in charge thereof as a tenant or as an overseer, acting as to the control, of the land in lieu and the stead of the owner.

In *S. v. Anderson,* 129 N. C., 521, it was held that a private night watchman while on duty upon the premises he is employed to watch is not liable under the statute. He is there in lieu of the owner of the premises and is carrying out the duty of protecting the premises just as the owner could do if present in person. That case holds that there is no conflict between *S. v. Terry* and *S. v. Perry,* both above quoted.

It is not necessary, in this case, to determine whether a superintendent of the mill who is in sole charge thereof would have the right to carry a concealed weapon, for this defendant merely had charge of one floor of the mill, the carding room, and was overseer thereof. To hold that one occupying that position was "on his own premises," within the meaning of the statute, would bring within the exception many persons in the same factory who might be overseers in different departments. The statute was intended to except only the owner, or the person who exercised dominion in his stead. Only such person could be said to be "on his own premises."

Rarely can an official of a corporation, unless a watchman, be said to be "on his own premises," within this statute, for he does not stand in the shoes of the owner for this purpose. Certainly neither the superintendent or conductor of a street car line nor the superintendent or conductor of a railroad would be authorized, unless commissioned as a policeman under the statute, to carry a concealed weapon. The fact that the defendant here concealed the pistol in his pocket in expectation of trouble with an employee shows that he proposed to take advantage of the concealment. As said in *S. v. Perry, supra,* this exception was intended for the owner in the privacy of his own property, and not to give any one an advantage over others with whom he is expecting a difficulty. It is because the advantage given by such concealment is a temptation to use the weapon that the statute forbids such concealment to others than the owner "on his own premises," except certain persons "when acting in the discharge of their official duties."

No error.

STATE v. HATTIE JOHNSON.

(Filed 24 March, 1915.)

1. Courts—Judgment Suspended—Sentence Pronounced—"Good Behavior."

Where judgment against defendant is suspended in a criminal action and continued from term to term of court under order that the defendant then appear for the purpose of showing "good behavior," it is not necessary in subsequently pronouncing judgment that the defendant be again guilty of the offense of which he had been convicted, the requirement of good behavior being that he demean himself as a good citizen and show himself worthy of judicial clemency.

2. Same—Findings—Appeal and Error.

Where sentence in a criminal action has been suspended during "good behavior," and thereafter judgment is pronounced, the findings of the trial judge in relation thereto are not reviewable on appeal.

APPEAL by defendant from *Daniels, J.*, at Fall Term, 1914, of LENOIR, from judgment sentencing her to six months imprisonment.

Attorney-General for the State.
Langston, Allen & Taylor, T. C. Wooten, Murray Allen for defendant.

BROWN, J. The defendant, at the January Term, 1913, had pleaded guilty to three bills of indictment charging her with retailing, and prayer for judgment was continued on condition of good behavior, and so ordered to be further continued from term to term for three years.

The defendant appeared for the purpose of showing her good behavior from term to term until the August Term, 1914. At that term it was made to appear that the defendant had been engaged in maintaining a bawdy-house in the town of Kinston since the previous term of six months. This exception is disposed of by the decision of the Court in the case of *S. v. Tripp,* 168 N. C., 150.

The condition of continuing the prayer for judgment was "upon condition of good behavior." This does not mean that she must not have been guilty of the same kind of misconduct as that of which she had been convicted, but that, as was said in the case of *S. v. Everett,* 164 N. C., 407: "When the judgment was suspended, the defendant assumed the obligation to show the court, from time to time, that he had demeaned himself as a good citizen and was worthy of judicial clemency." The finding of the court is not reviewable. *S. v. Bailey,* 162 N. C., 583; *S. v. Register,* 133 N. C., 747; *S. v. Wilcox,* 132 N. C., 11; *S. v. Kinsauls,* 126 N. C., 1092; *S. v. Carter,* 126 N. C., 1011.

Affirmed.

STATE v. EMMETT HOWARD.

(Filed 31 March, 1915.)

1. Slander—Indictment—Ambiguous Language—Questions for Jury.

The rule of evidence ordinarily applying to the charge of slander of an innocent and virtuous woman (Revisal, 3640) that parol evidence to show a meaning contrary to that which the words clearly imply is inadmissible, can have no application when these words are ambiguous and admit of a slanderous interpretation, for then it becomes a question for the jury to determine whether they amounted to the slanderous charge in the reasonable apprehension of the hearers.

2. Same—Evidence.

On trial of an indictment for slandering an innocent and virtuous woman (Revisal, sec. 3640), testimony that the defendant had said he had quit his old girl (the woman); another named person was going with her now; that she was no lady, but a crook, etc., is sufficient to sustain a conviction of the offense charged.

APPEAL by defendant from *Daniels, J.*, at October Term, 1914, of ONSLOW.

Criminal action. "On bill of indictment for the slander of Bessie Marshburn, an innocent and virtuous woman."

E. F. Hancock, a witness for the State, testified as follows: "I know defendant and Bessie Marshburn. Defendant said, about 1 May, where I was, and was talking of going with girls—said he had quit his old girl, Bessie Marshburn; that Luther Mills was going with her now; that neither one of them was worth anything; she was not a lady; she was nothing but a crook, and he could prove it by his brother Enoch."

In apt time defendant objected to this evidence. Exception overruled.

J. D. Marshburn, father of Bessie, testified: "I went to the defendant and said: 'Emmett, what sort of confounded report is this you are saying about my daughter being in Wilmington making money, not as a lady?' He said he said it to my daughter. I was mad and went to find out what he had said." This was objected to, overruled, and exception noted.

Bessie Marshburn, among other things, testified: "He (defendant) told me he knew something on me. I asked him what it was. He said: 'You were at Wilmington making money, not as a lady.' He was at our mail box."

Objection overruled, and exception.

And further: "He asked me to take a walk down the road with him, and I refused. I am a virtuous and innocent woman."

Demurrer to State's evidence overruled, and defendant excepted.

Defendant, among other things, denied making any insulting or derogatory statements of prosecutrix, etc. The court, after stating the terms of the statute, charged the jury, among other things, that in order to constitute the offense it was necessary that defendant should utter of and

concerning prosecutrix words that amounted to a charge of actual illicit sexual intercourse, and submitted to the jury to determine whether, under all the facts and circumstances, the words spoken by defendant to the witness Hancock, if so spoken, amounted to such charge.

The court further allowed the jury to consider the testimony of the other witnesses, in so far as their evidence tended to corroborate the witness Hancock.

In apt time the court was requested to charge the jury that in no event could defendant be convicted of the crime charged in the bill. Verdict of guilty. Judgment, and defendant excepted and appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Thad. Jones and T. C. Wooten for defendant.

HOKE, J. It was chiefly urged for error that the court did not sustain defendant's demurrer to the State's evidence, and that his Honor refused to charge, as requested, that in no aspect of the evidence could defendant be convicted; but the position, in our opinion, cannot be sustained.

His Honor properly charged the jury that in order to constitute the crime, within the meaning of the law, the words used must amount to a charge of incontinency. *S. v. Moody,* 98 N. C., 671. And while our decisions hold that when the words used have a fixed and unambiguous meaning, they may not, as a rule, be given a criminal significance by means of parol testimony that the hearers understood the "speaker to mean differently from the common import of the words" (*Pitts v. Pace,* 52 N. C., 558); it is also well established that "when the words spoken are ambiguous and fairly admit of a slanderous interpretation, it is then a question for the jury to determine on the sense in which the words were used and whether they amounted to the slanderous charge to the reasonable apprehension of the hearers." *Reeves v. Bowden,* 97 N. C., 30; *Lucas v. Nichols,* 52 N. C., 32; *Simmons v. Morse,* 57 N. C., 5; *McBrayer v. Hill,* 26 N. C., 36; *Emmerson v. Marvell,* 55 Ind., 265; 25 Cyc., 542.

A very satisfactory statement of the principle is given in this last citation, 25 Cyc., as follows: "It is the province of the court to determine what constitutes libel or slander abstractly. Hence, if the language is plain and unambiguous it is a question of law whether or not it is libelous or slanderous. But if the language is ambiguous and susceptible of two meanings, one defamatory and the other not, it is for the jury to decide in what sense it was used; however, it is for the court to determine whether or not the language on its face is capable of a double meaning, and should be submitted to the jury for construction. It is the duty of the court to say whether a publication is capable of the meaning ascribed

to it by the innuendo, but when the court is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it." And the position may, at times, be extended to terms and nicknames having general or local significance and rendering them slanderous to those who hear and so understand them. *Sasser v. Rouse,* 35 N. C., 142.

In the present case, while the terms used, "That he had quit his old girl, Bessie Marshburn; that Luther Mills was going with her now; that she was no lady; she was nothing but a crook, and he could prove it by his brother Enoch," may not have, primarily, the criminal significance, they are ambiguous in meaning, sufficiently so to call for the application of the principle, and we are of opinion that his Honor made correct ruling in referring the question to the jury.

The testimony of the other witnesses, J. D. Marshburn *et al.,* was clearly competent in corroboration of the principal witness, Hancock, and in explanation of the sense in which the words were used by the defendant in that conversation. *S. v. Mills,* 116 N. C., 1051; *Brittain v. Allen,* 13 N. C., 120. We find no reversible error, and the judgment is affirmed.

No error.

STATE v. O. V. SILER.

(Filed 14 April, 1915.)

1. Physicians — Licensed Practitioners — Nondrug-giving Practitioners—Examination—License—Criminal Law.

Under the provisions of chapter 92, Laws 1913, amending chapter 764, Laws 1907, Pell's Revisal, secs. 4505a, 4505h, 4505m, those who practice and receive pay for the treatment of human diseases without the use of drugs, and who are not licensed osteopaths, are required to take the examination and receive the license provided for in the later statute, with the exceptions therein stated, *i. e.*, licensed physicians, Christian scientists, masseurs or following the orders of a licensed drug-giving physician; hence one engaged in the practice of "chiropractic and suggestotherapy," or treating human diseases by manipulating the spine, or treating nervous diseases by mental suggestion, without the examination and license prescribed, are guilty of a misdemeanor.

2. Same—Monopoly—Constitutional Law.

Laws 1907, chapter 764, Pell's Revisal, secs. 4505a, 4505h, 4505m, as amended by chapter 92, Laws 1913, extending the requirement of examination and license to other nondrug-giving practitioners for compensation, than osteopaths, with the exceptions stated in the later statute, making the violation of its provisions a misdemeanor, was for the protection of the people, and was not intended to give, nor does it give, those who comply with the law a monopoly, inhibited by the Constitution.

APPEAL by State from *Devin, J.,* at December Term, 1914, of GUILFORD.

Attorney-General for the State.
Roger W. Harrison and Thomas C. Hoyle for defendant.

CLARK, C. J. The defendant was tried and found guilty in the municipal court of Greensboro for practicing for fee and reward, without license, as "a nondrug-giving physician." On appeal to the Superior Court of Guilford, upon a special verdict finding the facts, the judge held the defendant not guilty, and the State appealed.

The special verdict states that the defendant was tried under the act of 8 March, 1907, being chapter 764, as amended by chapter 92, Laws 1913. It is agreed that the defendant was resident in Greensboro 14 April, 1914, and on that day was engaged in the practice of "chiropractic and suggesto-therapy" as a nondrug-giving physician, and received compensation therefor; that chiropractic is a system of treating human diseases without use of drugs, by manipulating the spine, and that suggesto-therapy is a system of treating nervous diseases without the use of drugs, by mental suggestion; that the defendant has not been examined nor licensed as an osteopath under chapter 764, Laws 1907, or chapter 92, Laws 1913, amendatory thereof.

It is further agreed and found as a part of the special verdict that "the defendant was not practicing osteopathy nor was he practicing, pretending or attempting to practice or use the science or system of osteopathy in treating diseases of the human body, and that he did not hold himself out in any manner as engaged in the practice of osteopathy."

The State contends that section 2, chapter 764, Laws 1907, makes it unlawful to practice any nondrug healing system as an osteopath without taking the required examination and being licensed thereunder, and that chapter 92, Laws 1913, requires examination and license of "all nondrug practitioners, by whatever name known and of whatever school they claim to be graduate of," and that the defendant is guilty of a misdemeanor by virtue of said act of 1913.

The defendant contends that the act of 1907 as amended by the act of 1913 does not require nondrug-giving physicians other than osteopaths to pass examination or take out license, and that if it did, such act would be unconstitutional.

Laws 1907, ch. 764, sec. 8, now Pell's Revisal, 4505a, defines osteopathy to be "the science of healing without the use of drugs, as taught by the various colleges recognized by the American Osteopathic Association." Section 2 of said act, now Pell's Revisal, sec. 4505h, requires "any person, before engaging in the practice of osteopathy in this State, to obtain a certificate and license to practice osteopathy from the board" therein designated. Section 9 of said act, now Pell's Revisal, 4505m, provides that that chapter shall not prevent or interfere with "any person engaging in the act of healing in any manner taught by any school of medicine

or science, except such as claim to be osteopaths or practice osteopathy as herein defined."

Laws 1913, ch. 92, amends the aforesaid chapter 764, Laws 1907, in several particulars, and especially strikes out above cited section 9, Pell's Revisal, 4505m, and adds to section 2, now Pell's Revisal, 4505h, the following: "The provisions of this section shall apply to all other nondrug-giving practitioners, by whatever name known or calling themselves, or of whatever school they claim to be graduates, or hold diplomas, and to any one who holds himself or herself out as being able to diagnose, treat, operate, or prescribe for any human disease, pain, injury, deformity, or physical condition, and who shall offer or undertake by any means or method to diagnose, treat, operate, or prescribe for any human disease, pain, injury, deformity, or physical condition without the use of drugs, but shall not apply to those practicing their profession as licensed physicians, nor to Christian Scientists or masseurs or any one following in his or her practice the orders of licensed drug-giving physicians: *Provided, however*, that all persons so applying to said board for examination shall be examined only on the subjects of anatomy, physiology, pathology, and diagnosis, by said board, but no license shall be issued by said board to those who claim to be correspondence school course graduates, to practice in this State."

Chapter 764, Laws 1907, provided that any person who should practice or attempt to practice that particular method of healing (osteopathy) without having complied with the provisions of the act should be guilty of misdemeanor. Laws 1913, ch. 92, sec. 5, after inserting above amendment to section 6, which brought under the provisions of the act of 1907 "all other nondrug-giving practitioners, by whatever name known or calling themselves," added the following at the end of said section 6 of the act of 1907: "and the punishment prescribed in this section shall likewise apply to others embraced in the provisions of this amended act and violating any of its provisions." This simply makes the violation of the act, as amended, a misdemeanor.

There are other amendments to the act of 1907, set out in said chapter 92, Laws 1913. But the above shows the purport of the legislation. In chapter 764, Laws 1907, the General Assembly provided for the examination and licensing of nondrug-giving physicians known as osteopaths, in order to protect the public against incompetents and imposters professing to be osteopaths. The act of 1913, ch. 92, simply extends the act of 1907 to require the examination and licensing of "all other nondrug-giving practitioners, by whatever name known," and makes those violating this statute guilty of misdemeanor to the same extent as those had been who practiced as osteopaths without complying with the requirements of the act of 1907.

The power of the Legislature to pass such statutes has been fully discussed and settled in *S. v. Call,* 121 N. C., 643, and *S. v. Van Doran,* 109 N. C., 864, as to practitioners of medicine and surgeons. In *S. v. Call, supra* (p. 646), are enumerated many "other callings, whether skilled trades or professions, affecting the public and which require skill and proficiency," whose members must be examined and licensed. Since then the Legislature has required examination and license for following many other vocations.

The subject has been fully and more recently discussed, in sustaining the constitutional authority of the Legislature to regulate the practice of dentistry, by *Mr. Justice Walker, S. v. Hicks,* 143 N. C., 689.

In *S. v. Biggs,* 133 N. C., 729, and in *S. v. MacKnight,* 131 N. C., 723, this Court held that the object of such legislation was not to give special or exclusive privileges to any special body of men, but solely for the protection of the public, and to prohibit imposition by any one passing himself off as competent to engage in a practice or calling of a public nature when he was incompetent to do so. Therefore, it was held that the act in regard to the practice of medicine and the examination prescribed therefor could not embrace osteopaths, who did not prescribe drugs or other medicine.

By the act of 1907, Laws 764, it was intended to protect the public against imposition by those claiming to heal diseases without the use of drugs as osteopaths. Since then those claiming to heal without prescribing drugs have taken various and numerous appellations, and thus have avoided the protection intended to be afforded the public as to "nondrug-giving physicians" by the act of 1907. In consequence, the act of 1907 was amended in 1913 to add after the word "osteopathy" the words, "or other nondrug-giving school of practice." The act also, as above set out, fully and elaborately prescribes that it should apply to all practice of healing of every kind that was not drug-giving, excepting only "Christion Scientists or masseurs or any one following in his or her practice the orders of licensed drug-giving physicians."

The object of the act of 1913 is simply to extend the protection to the public given by the act of 1907 as against all other nondrug-giving practitioners of healing, with the exception just quoted. That this is the scope of the act, and that it is not intended to make compliance therewith a monopoly in the hands of "osteopaths," the act prescribes an examination only in the following subjects: "anatomy, physiology, pathology, and diagnosis." Less could not be required, reasonably, of any one holding himself out as competent to prescribe for "the ills that flesh is heir to."

The statute makes a violation of the act of 1907 a misdemeanor, and the act of 1913 makes a violation of the act in its extended scope, taking in other nondrug-giving practitioners, "likewise a misdemeanor."

The object of the act, as already said, is not to give "osteopaths," or any school of practice, a monopoly, but to protect the public by requiring of all nondrug-giving practitioners, with the exceptions named, the prescribed examination and license.

To give this statute any effect, it was necessary to make its violation a misdemeanor. The power of the Legislature to pass such enactments has been already considered in the cases above cited, and the intent of this statute is clearly and solely for the protection of the public. An uneducated, ignorant, and incompetent doctor turned loose on a helpless community is as deadly as a park of artillery.

Upon the special verdict the court shall have held the defendant guilty.

Reversed.

STATE v. S. A. GIBSON.

(Filed 22 April, 1915.)

1. Criminal Law—Indictment—Proof—Variance—Constitutional Law.

The evidence must, at least in substance, correspond with the charge of an indictment for a criminal offense, and sustain it in order to convict the defendant, as he has the constitutional right to be informed of the accusation against him. Const., Art. I, secs. 11, 12, and 13.

2. Same—Note—Money—Nonsuit—Interpretation of Statutes.

The indictment for false pretense must describe the thing alleged to have been thereby obtained with reasonable certainty, and by the name or term usually employed to describe it; and where the indictment charges obtaining money by a false pretense, and the State's evidence tends only to show that the defendant had obtained the signature of the prosecutor as an indorser or surety to a negotiable instrument under the assertion that others, whose financial responsibility was known to him, had promised to sign, as cosureties, and should sign before negotiation, which was in all respects false; that the defendant obtained money thereon from the bank with his signature alone, which he had been forced to take up with his own note, there is a fatal variance between the charge and the proof, and defendant's motion to nonsuit should be sustained. Laws 1913, ch. 73.

3. Same—Motions—Arrest of Judgment—Amendments.

The State must prove the charge of a criminal offense as laid in the bill, without power to amend against the will of the defendant; and where the charge is made of obtaining money under a false pretense, and the evidence tends only to show that a note has been obtained, a motion to nonsuit is the proper method of raising the question of variance (Laws 1913, ch. 73), and a motion in arrest of judgment should be denied.

4. Criminal Law—Indictments—Variance—New Indictment.

Where an indictment for a false pretense in obtaining money has failed on account of a variance in the proof tending to show that a signature to a note had been thus obtained, it is open to the State, upon another and proper indictment, to convict for the offense of obtaining the signature by false pretense, under Revisal, sec. 3433; and should the solicitor send another bill with averments agreeing with the proof, the trial court may hold the defendant to answer this indictment.

STATE *v.* GIBSON.

APPEAL by defendant from *Lyon, J.*, at August Term, 1914, of ROCKINGHAM.

The defendant was charged in the court below with obtaining money under false pretenses, upon the following indictment:

The jurors for the State, upon their oaths, present: That S. A. Gibson, late of the county of Rockingham, wickedly and feloniously devising and intending to cheat and defraud William S. Martin, on the 23d day of October, A. D. 1912, with force and arms at and in the county aforesaid, unlawfully, knowingly, designedly, and feloniously did unto William S. Martin falsely pretend that Thomas Knight, T. H. Barker, and A. F. Tuttle had consented to become sureties for said S. A. Gibson on a note for the sum of $350, and that he, said S. A. Gibson, had to get another on the note with said Thomas Knight, T. H. Barker, and A. F. Tuttle, and that their signatures would be secured on said note before its transfer or disposal. Whereas, in truth and in fact, said Thomas Knight, T. H. Barker, and A. F. Tuttle had not consented to become sureties for said S. A. Gibson on a note for $350. By means of which said false pretense he, the said S. A. Gibson, knowingly, designedly, and feloniously did then and there unlawfully obtain from the said William S. Martin the following goods and things of value, the property of William S. Martin, towit, $350, with intent then and there to defraud, against the statute in such case made and provided, and against the peace and dignity of the State.

S. P. GRAVES,
Solicitor.

W. S. Martin, the prosecutor, testified: "At the time of the alleged offense I lived in the town of Leaksville, Rockingham County, and was engaged in the livery business. The defendant came to me at my office and asked me to go on his note with T. H. Barker, Thomas Knight, and Dr. Tuttle, for the sum of $350; that he, S. A. Gibson, had seen Barker, Knight, and Tuttle, and that they had agreed to sign the note with me. I told Gibson to get the other men to sign it and I would sign it. Gibson said he wanted to use the note that evening, and that if I would sign it then, he would go immediately and get the signatures of the others. I knew T. H. Barker, Thomas Knight, and Dr. Tuttle; they were residents of the same town, and I knew of their solvency. The note was to run three months, being dated 23 October, 1912. I would not sign the note alone, and relied upon the statement made to me by the defendant, that the three parties named had promised to become sureties or indorsers thereon. Upon these representations made to me by the defendant, I signed the note and never knew but that they were sureties thereon until I was notified by the Bank of Leaksville, in which the note had been discounted, of its maturity, and a demand was made upon me for payment thereof, when I discovered that my name alone appeared as surety, none

of the others, Barker, Knight, nor Tuttle, having signed it. I took up the note upon demand of the bank, by the renewal thereof in my own name, and became solely responsible for its payment." There was evidence by three witnesses, A. F. Tuttle, Thomas Knight, and F. T. Barker, that they had not promised or agreed to sign the note as sureties, and no one of them had promised to sign it as surety. There was also further evidence as to how the note was taken up in the bank by the prosecutor.

The defendant moved for a nonsuit under the statute (Public Laws 1913, ch. 73) because the State had failed to make out a case against the defendant upon all the evidence. The motion was overruled, and defendant excepted. There was a verdict of guilty. Defendant moved in arrest of judgment. Motion overruled. Judgment on the verdict, and defendant appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

P. W. Glidewell and Manning & Kitchin for defendant.

WALKER, J., after stating the case: It is an elementary rule in the criminal law that a defendant must be convicted, if at all, of the particular offense alleged in the bill of indictment. He has the constitutional right to be informed of the accusation against him, "by indictment, presentment, or impeachment," and no person shall be convicted of any crime but by the unanimous verdict of a jury upon the charge so made. Const., Art. I, secs. 11, 12, and 13. The evidence, therefore, must correspond with the charge and sustain it, at least in substance, before there can be a conviction. The defendant contends that the evidence in this case does not so correspond with the charge, and does not, in law, support it, but that there is a fatal variance between the two. If this be so, the verdict was wrong and cannot stand. He is charged in the bill with obtaining money, towit, $350, by a false pretense, while the proof tends to show only that, while he made the false representation knowingly and corruptly, he did not obtain money by reason thereof, but was induced to part with the note, which he signed for the defendant, and which he afterwards "took up" with another note signed also by himself, and that he has never paid any money on the note, and certainly none to the defendant. All the defendant got was a note signed by the prosecutor; how it was done and to whom payable does not appear. The defendant never got any money from the prosecutor. What he did get, we presume, was paid by the bank to him. There was a fatal variance between the allegation in the bill and the proof. It is the general rule that the thing obtained by the false pretense, as in the case of the thing stolen in larceny, must be described with reasonable certainty, and by the name or term usually employed to describe it. McLain's Cr. Law, sec. 595;

S. v. Reese, 83 N. C., 637. A promissory note must be described as such, and not as money. 3 Bish. New Cr. Proc., p. 1691, sec. 732 (3). We never properly speak of such a note as "money" or as "so many dollars." Money is any lawful currency, whether coin or paper, issued by the Government as a medium of exchange, and does not embrace within its meaning a note given by one individual to another or otherwise put in circulation. Our statute in regard to larceny, embezzlement, and false pretenses makes the distinction clearly and unmistakably. It makes indictable the obtaining by a false token or other false pretense any "*money,* goods, property, or other thing of value, or any bank note, check, or order for the payment of money, issued by or drawn on any bank or other society or corporation within this State, or any of the United States, or any treasury warrant, debenture, certificate of stock, or public security, or any order, bill of exchange, bond, promissory note, or other obligation, either for the payment of money or for the delivery of specific articles, with intent to cheat or defraud any person or corporation." Revisal, sec. 3432. It will be seen from this provision of the statute that it classifies those things the obtaining of which by a false pretense is made criminal, and carefully distinguishes between them, and assigns to each its own proper name and designation, as something separate and distinct from the others. It was held in *Com. v. Howe,* 132 Mass., 250, 258, that an averment of obtaining a sum of money by false pretense is not supported by proof of obtaining a certificate of deposit of a bank, as the property should have been more accurately described and by its usual name, and that variance was not cured by their statute of jeofails and amendments. And to like effect it was held in *Carr v. State,* 104 Ala., 43, that to warrant a conviction under an indictment which charges the defendant with having embezzled or fraudulently converted to his own use money, the evidence must show that the money came into the possession of the defendant; and the proof that the defendant received only a check, and not money, will not sustain a verdict of guilty. Illustrations of the strictness of the rule may be found in many of the cases on the subject. *Berrien v. State,* 83 Ga., 381, where it was held that an indictment for falsely and fraudulently mortgaging a "dark bay mare mule" was not supported by proof that the defendant mortgaged a "mouse-colored mare mule named Mag," as he would not be protected by an acquittal or conviction in a future indictment for having fraudulently mortgaged a mule of the latter description. *Barclay v. State,* 55 Ga., 179. Also as to a like variance in the description of a note. Wallace, 79 Tenn., 542. And as to a fatal variance between a description of "United States legal tender notes" and "National bank notes." *People v. Jones,* 5 Lansing (N. Y.), 340. To same effect, *Harris v. State,* 30 S. W., 221. In *Com. v. McMarriman,* 15 Pa. Co. Ct. Rep., 495, the

charge that defendant robbed the prosecutor of a promissory note was held not sustained by proof that he robbed him of "money" or "so many dollars." That is our case with the terms reversed, and the rule should apply conversely. Where the defendant was charged with obtaining a clay-bank mare by a false pretense as to the qualities of a "sorrel horse," and the proof was that he got a "saddle horse," we held it to be a material variance, *Justice Hoke* saying that, "under the authorities, there would seem to be a clear case of variance between the allegation and the proof, and the jury should have been so instructed." *S. v. Davis,* 150 N. C., 851, citing *S. v. McWhirter,* 141 N. C., 809; *S. v. Corbitt,* 46 N. C., 264. So it was held in *S. v. Hill,* 79 N. C., 256, that a charge that defendant had injured a "cow" was not proved by showing an injury to an "ox." See, also, *S. v. Ray,* 92 N. C., 810; *S. v. Miller,* 93 N. C., 511. The differences in the above cases between *"allegata and probata"* were not as marked or as substantial as is the difference in this case between "money" and "a promissory note." They are two distinct things, each having its well known meaning and name in the parlance of the people as well as in the law. An action for "money" would not permit of a recovery for a note, without amendment. You cannot amend an indictment—at least, against the will of the defendant. You must abide by its terms, and prove the charge as it is laid in the bill. A variance cannot be taken advantage of by motion in arrest of judgment. *S. v. Foushee,* 117 N. C., 766; *S. v. Ashford,* 120 N. C., 588; *S. v. Jarvis,* 129 N. C., 698. It is waived if there is no objection to it before the verdict is rendered, as those cases show. But a motion to nonsuit is a proper method of raising the question as to a variance. It is based on the assertion, not that there is no *proof* of a crime having been committed, but that there is none which tends to prove that the particular offense charged in the bill has been committed. In other words, the proof does not fit the allegation, and, therefore, leaves the latter without any evidence to sustain it. It challenges the right of the State to a verdict upon its own showing, and asks that the court, without submitting the case to the jury, decide as matter of law that the State has failed in its proof.

The judge should have sustained the motion and dismissed the indictment; but this will not prevent a conviction upon another indictment for obtaining the note by a false pretense, and this follows from what we have said. A party is indictable under Revisal, sec. 3433, for obtaining a signature to any written instrument, the false making of which would be punishable as forgery. The evidence offered at the trial proved an indictable offense, but not the one alleged in the bill. We presume the solicitor will send a bill with averments agreeing with the proof he can make, and the court may hold the defendant to answer another indictment.

The judgment is reversed, the verdict set aside, and the bill of indictment dismissed as of nonsuit.

Reversed.

STATE v. AGNES COLLINS AND LOLLIE COLLINS, IN RE BELL AND JENKINS.

(Filed 22 April, 1915.)

1. Criminal Law—Frivolous Prosecution—Prosecutors—Costs—Notice—Constitutional Law—Statutes.

It is necessary for the trial court, in order to adjudge the prosecution of a criminal action to be frivolous and malicious and tax the costs against the prosecutors who have employed attorneys to assist the solicitor, to give the prosecutors notice of such action and hear the matter according to the "law of the land." Revisal, sec. 1295, section 17 of the Bill of Rights, N. C. Const.

2. Constitutional Law—Bill of Rights—Due Process.

The "law of the land" as used in our Bill of Rights is equivalent to "due process of law," requiring in its essential elements that notice and opportunity to defend be given the party accused.

3. Same — Appeal and Error — Findings of Court—Frivolous Prosecution—Costs—Procedure.

Where the trial judge has dismissed a criminal action as being frivolous and malicious, and taxed the prosecutors with costs, and it appears from his findings of record that he has done so without any proper consideration of their affidavits in support of their position, and relevant to the issue, so as to deprive them of the benefits of due process of law, his order will be set aside on appeal, leaving the matter open for proper adjudication. *S. v. Hamilton*, 106 N. C., 660, cited and distinguished.

APPEAL by prosecutors from *Peebles, J.*, at Fall Term, 1914, of JONES.

This was a bill of indictment found by the grand jury.

At the close of the State's testimony, his Honor being of opinion that the prosecution was frivolous and malicious, so adjudged, and ordered that E. H. Bell and F. M. Jenkins, who had assisted in employing counsel to aid the solicitor, should be marked as prosecutors; that they be taxed with the costs and placed in the custody of the sheriff "till the costs be paid." These parties, having duly excepted, appealed to the Supreme Court.

L. I. Moore and J. K. Warren for appellants.

No counsel contra.

HOKE, J. The statute of this State which authorizes the court to mark one as prosecutor in a criminal action (Revisal 1905, sec. 1295) contains the proviso: "That no person shall be made prosecutor after the finding of the bill unless he shall have been notified to show cause why he should

not be made the prosecutor of record," and by the language of this provision, or even by the very fact that notice is required, it is clearly contemplated that the parties interested shall have their cause heard, and heard, too, according to the "law of the land." This term, "law of the land," as used in the 17th section of our Bill of Rights, has received notable and approved definition as: "Law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial." In *Parish v. Cedar Works,* 133 N. C., 478, it is held to be the equivalent of "due process of law," as it is expressed in the Federal and many of our State constitutions; and in *Simon v. Craft,* 182 U. S., 427, it is said that the essential elements of due process of law are "notice and opportunity to defend."

In Connor and Cheshire's Constitutions, at page 58, in speaking to these requirements of "notice and hearing," embodied in the constitutional provision, the learned annotators, among other things, say: "Notice and hearing are essential to constitute due process of law or the 'law of the land,' and it is necessary that a party be cited and have *his day in court,* upon which he may appear and defend himself and his rights and his property." And again: "Due process of law not only requires that a party should be brought into court, but that he shall have opportunity, when in court, to establish any fact that, according to the usages of the common law or the provisions of the constitutions, would be a protection to him or his property," citing *S. v. Cutshall,* 110 N. C., 538, and other cases.

On perusal of the facts presented, it clearly appears that these appellants have had no hearing of their cause within the meaning of these principles. At the trial, which seems to have taken place on Tuesday of the term, 8 December, his Honor, on motion, dismissed the action and, being of opinion that the prosecution was frivolous and malicious, called on E. H. Bell, who was present in court, to show cause why he should not be marked as prosecutor. It does not clearly appear whether the order as to Bell was then made or later, but, on being asked by counsel if he would not hear from Bell, his Honor replied that he would, and thereupon issued a citation to F. M. Jenkins returnable on Friday following, and, when the cause was again called, after notice served on Jenkins, the appellants were in court, ready with their own and numerous affidavits of the best citizens of the community tending to show good faith on part of appellants and that defendants in the bill of indictment were guilty as charged, many of them to the effect that "both of the appellants were men of high character and integrity, who stood for all things which make for the best moral standards of citizenship in the town of Maysville, where they reside; that they are men of kind hearts, good judgment, and common sense; that each has a family, consisting of

wife and several children, all of whom deport themselves as good moral citizens," etc. Others made averment of facts and relevant incidents tending to show guilt on part of defendants in the principal case, and which were known to appellants when they agreed, with other citizens, to employ special counsel to aid the solicitor in the prosecution. His Honor declined to hear or consider the affidavit of E. H. Bell or any supporting affidavits of "outsiders" on the subject, but finds that "he did not make the order before he heard the affidavit of Jenkins." In reference to this, to quote from his Honor's findings on the subject, he says: "The statement that I found the facts before I heard the answer of Jenkins is not correct. It is true that I refused to hear affidavits of outsiders and their petitions. Bell was in court when I called on him to show cause why he should not be marked as prosecutor and be made to pay the costs. He showed none, and I made the order. The solicitor asked if I would not hear from Bell. I told him I would, and nothing else was said until late Saturday afternoon, when M. Warren asked to be allowed to read Bell's answer and affidavits. I had decided to hear nothing more from Bell, declined to hear his answer and affidavits, because I had made up my mind that the prosecution was malicious, and did not want to consume any more time with the matter."

In the disposition made of this appeal we do not intend to impair or qualify our former decisions on the subject, notably *S. v. Hamilton,* 106 N. C., 660, and *S. v. Roberts,* 106 N. C., 662, to the effect that, on a hearing of this character, the findings of fact by the trial judge are conclusive. In the disposition of these and like motions there must necessarily be some tribunal having the power to determine the ultimate facts on which the rights of the parties depend, and we think the cases which refer this power to the trial judge, who is present and has opportunity to personally observe and note the circumstances and attendant conditions, are grounded in good reason; but, on the facts as they appear from his Honor's findings, and we think it not improper to say that he has spread them on the record with commendable candor, we are of opinion that these men, as heretofore stated, have had no proper hearing, within the meaning of the constitutional provision, and that the judgment against them must be set aside.

This will be certified, that the order and findings by which appellants have been marked as prosecutors and taxed with the costs be set aside and the question reheard in accordance with law and the course and practice of the court.

Reversed.

STATE v. WALTER J. KENNEDY.

(Filed 28 April, 1915.)

1. Murder—Self-defense—Quitting the Combat.

In order to establish a perfect self-defense for a homicide in a fight wrongfully brought about by the defendant, especially when he has done so by a battery, it must be shown by him that, at a time prior to the act of killing, he had "quitted the combat"; and while this expression does not necessarily imply a physical withdrawal at the peril of life and limb, he must show an abandonment in good faith and that he had so signified to his adversary.

2. Same—Prior to Killing—Time of Killing—Trials—Instructions.

One who has brought about a fight resulting in the death of his adversary cannot maintain a perfect self-defense by showing that at the precise time the act was committed he was sorely pressed and could not abandon the combat with proper regard for his own safety; and where the evidence on behalf of the State tends to show that the defendant walked into the store of the deceased, quarreled with him, slapped him in the face while holding a pistol in his hand, and then shot and killed him with it, and on behalf of the defendant, that he had been first assaulted by the deceased and his brother, who knocked him against a partition in the barber shop, then to his knees, continuing to beat him on the head and shoulders, when he said, "Boys, get off of me" three or four times, then threatened to shoot, and as they did not do so, he fired the fatal shot: *Held*, upon this conflicting evidence, the charge of the court was correct, which, in substance, instructed the jury that if the defendant provoked the assault and fought willingly and wrongfully he would at least be guilty of manslaughter, unless, before delivering the fatal shot, he had in good faith abandoned the difficulty, and retreated as far as he could with safety.

3. Evidence—Dying Declarations—Weight of Evidence—Court's Discretion—Instructions.

While dying declarations are not made under oath and subject to cross-examination, and should be considered by the jury with a certain amount of caution, the way in which this caution may be expressed, in a charge to the jury, is, to a great extent, left to the discretion of the trial judge, who having properly charged thereon in this case, exception thereto that he had not used the language approved in a certain precedent will not be sustained on appeal.

APPEAL by defendant from *Lane, J.*, at November Term, 1914, of STANLY.

Indictment for murder of one John (called Johnnie) Morton.

It was proved that, on 7 March, 1914, about 5 p. m., at Oakboro, in said county, Johnnie Morton was shot and mortally wounded by Walter Kennedy, and died of the wound about four days thereafter.

There was evidence on the part of the State tending to show that Kennedy and one Pointer, a lightning-rod agent, were driving by the store of deceased, where the latter and William Osborne and several others then were, and received the impression that some one in the store cursed Pointer, referring to him as a "damned old lightning-rod agent"; that

the buggy was stopped, and Pointer, going in the store, inquired who cursed him, repeating the charge. Some one said no such talk was in here, and Kennedy replied, "You can't bluff me; some of you said it," and the two walked out, Kennedy going into a barber shop near by; that shortly thereafter, Columbus Morton, who had been in the barber shop, went into his brother's store and told him he could go and be shaved, as the brother could mind the store for him, and Johnnie walked into the barber shop, and as he was about to take his seat in one of the chairs, Johnnie said, "Kennedy, there was a mistake about that cursing," and Osborne said, "Yes, Walter, there was a misunderstanding," when Kennedy said, "You can't scare me or bluff me," and slapped Morton in the face, and Morton put his hand on Kennedy's shoulder and said, "Why, Walter, what do you mean?" and Kennedy shot him in the body under the arm, inflicting the wound of which he died.

Connor Smith and Finley Hinson, eye-witnesses of all or a part of the occurrence, and the dying declaration of the deceased were in substantial accord as to this version, and the account received confirmation from the declaration of Kennedy, telling how the bullet entered and ranged. The course of the ball also was in support of the position of the State that the pistol was fired and the wound inflicted while the parties were in an upright position.

One of the State's witnesses testified that Kennedy had his pistol out when he first slapped the deceased in the face, and it was argued by the State that the bruises found on the knees of Kennedy, after the killing, were caused in the struggle which occurred when the father and brother of the defendant took the weapon away from him.

The evidence of the defendant tended to show that, after the talk at the store, defendant went into the barber shop to get a shave, and, while he waited for the water to heat, Osborne came in and said: "Kennedy, I don't like to be accused of a thing I'm clear of," and W. said, "Mr. Osborne, I haven't accused you of anything you didn't do," etc., and he said, "You accused me of cursing Pointer, and I didn't do it," and W. said, "I don't say you are the man," etc. Osborne replied, "I'm not the man; I never fought any, but I'm not like the man who can't." "Then Johnnie came in and said, 'Walter Kennedy, you are trying to run my business,' and I replied, 'I am not, and I don't want to run any such business as you run, and you can't run mine.' And when I said that he struck me—right up here on the head. (Witness indicates on head.) I kinder dodged down, and he knocked me back against the partition right at the back of the stove. That partition is between where we were and the little back room, and there are some curtains hung up there. He knocked me against that partition, and then his brother, Lum Morton, come in. He is the one that was on the stand here yesterday. And Lum

Morton said, 'Damn him, let me get hold of him, and I'll fix him,' and he caught me in the collar and jerked me to my knees; both of them beating me in the back of the head and shoulders, he striking my right shoulder, and I said, 'Boys, get off of me,' three or four times, and I said, 'If you don't, I'll shoot you off,' and they wouldn't do it; so I drew my gun and fired. They bruised my shoulder and back of my neck; my head was sore, and my knees were scarred up and skinned. I hurt my knees on the floor. I would rear up and try to get up with them, and they would press me back to the floor, and that is how my knees got bruised. My clothes were cut, on the left side. I asked them three or four times to get off. Lum Morton caught hold of me in the collar. It tore my collar loose in the hole. My clothes are there in that suitcase. Both of my coats were cut. My coat and overcoat, too. My collar was torn and my coat and overcoat were cut. It cut through the overcoat. I did not see the knife. I felt it when he cut my coat. I felt my coat pulling from me, and kinder zip, zip; sorter that way. (Collar, cravat, and overcoat were exhibited in court, and witness showed the torn and cut places on same.) I shot John Morton to save my own life. I thought they were going to kill me. They would not get off of me. When the gun fired, they left me. They ran out when the pistol fired, and my brother was the first man that came to me, and he said, 'Don't shoot any more.' His name is Vander. He took my gun and said, 'Don't shoot any more,' and I said, 'Here, take my gun, and keep them off of me.' I told him that and handed him my gun, and I walked out of the door. John Morton run out. I never did see him, but where they say he fell a good many were rushing up around there."

The testimony of the father and brother of the defendant was in substantial support of defendant's account. Cuts on his coat and bruises on his knees were proved to have been shown not long after the occurrence; certainly that same night or early next morning.

His Honor charged the jury, fully reciting the positions of the parties and much of the evidence.

There was verdict of guilty of manslaughter. Judgment on the verdict, and defendant excepted and appealed, assigning for the error a portion of his Honor's charge, as follows: "Now, the law is that if a person by his own conduct, either by words or acts, calculated and intended to provoke a difficulty, induces or provokes another to assault him, and a combat ensues, and the person who provokes another to assault him fights willingly and wrongfully, he is at least guilty of manslaughter, unless, before delivering the fatal blow or act, he has in good faith abandoned the difficulty and retreated as far as he can with safety, and then only can he be heard to plead self-defense, if he has been at fault in bringing on the difficulty."

And the refusal to give the following prayer in reference to the dying declarations of the deceased: "The admission of dying declarations is the exception to the general rule of evidence which requires that the witness should be sworn and subjected to a cross-examination. The solemnity of the occasion may reasonably be held to supply the place of an oath, but nothing can fully supply the absence of a cross-examination. Such declarations should be received with much caution on account of the absence of such cross-examination, and the jury in this case in passing upon the credibility of the alleged dying declaration in this case should take into consideration that the deceased was not subjected to a cross-examination."

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

J. C. Brooks, F. I. Osborne, R. L. Smith, R. E. Austin, G. D. B. Reynolds, A. C. Huneycutt, J. J. Parker for defendant.

HOKE, J., after stating the case: In *S. v. Brittain,* 89 N. C., 481, and in reference to defendant's first exception, this Court held: "Where a prisoner makes an assault upon A. and is reassaulted so fiercely that the prisoner cannot retreat without danger of his life, and the prisoner kills A.: *Held,* that the killing cannot be justified upon the ground of self-defense. The first assailant does the first wrong and brings upon himself the necessity of slaying, and is therefore not entitled to a favorable interpretation of the law." And, in support of the position, *Ashe, J.,* delivering the opinion, quotes from *Lord Hale,* as follows: "If A. assaults B. first, and upon that assault B. reassaults A., and that so fiercely that A. cannot retreat to the wall or other *non ultra* without danger of his life, and then kills B., this will not be interpreted to be *se defendendo,* but to be murder or simply homicide, according to the circumstances of the case; for otherwise we should have all the cases of murder or manslaughter, by way of interpretation, turned into *se defendendo.* The party assaulted, indeed, shall, by the favorable interpretation of the law, have the advantage of this necessity to be interpreted as a flight, to give him the advantage of *se defendendo,* when the necessity put upon him by the assailant makes his flight impossible; but he that first assaulted hath done the first wrong, and brought upon himself this necessity, and shall not have the advantage of his own wrong to gain the favorable interpretation of the law, that that necessity which he brought upon himself should, by the way of interpretation, be accounted a flight to save himself from the guilt of murder or manslaughter."

The same position is stated by the Court in *Garland's case,* 138 N. C., 675, as follows: "It is the law of this State that where a man provokes a fight by unlawfully assaulting another, and in the progress of the fight

kills his adversary, he will be guilty of manslaughter at least, though at the precise time of the homicide it was necessary for the original assailant to kill in order to save his own life. This is ordinarily true where a man unlawfully and willingly enters into a mutual combat with another and kills his adversary. In either case, in order to excuse the killing on the plea of self-defense, it is necessary for the accused to show that he 'quitted the combat before the mortal wound was given, and retreated or fled as far as he could with safety, and then, urged by mere necessity, kills his adversary for the preservation of his own life.'" Foster's Crown Law, p. 276. The same author says, on page 277: "He, therefore, who, in case of a mutual conflict, would excuse himself on the plea of self-defense, must show that before the mortal stroke was given he had declined any further combat and retreated as far as he could with safety, and also that he killed his adversary through mere necessity and to avoid immediate death. If he faileth in either of these circumstances he will incur the penalty of manslaughter," citing also the above passage from *Lord Hale* and *Brittain's case, supra,* in support and illustration of the principle.

It may be well to note that the term "quitting the combat," within the meaning of these decisions, does not always and necessarily require that a defendant should physically withdraw therefrom. If the counter attack is of such a character that he cannot do this consistently with safety of life or limb, such a course is not required; but before the right of perfect self-defense can be restored to one who has wrongfully brought on a difficulty, and particularly where he has done so by committing a battery, he is required to abandon the combat in good faith and signify this in some way to his adversary. The principle here and the basic reason for it is very well stated in case of *Stoffer v. The State*, 15 Ohio St., 47: "There is every reason for saying that the conduct of the accused relied upon to sustain such a defense must have been so marked in the matter of time, place, and circumstance as not only to clearly evince the withdrawal of the accused in good faith from the combat, but also as fairly to advise his adversary that his danger has passed and to make his conduct thereafter the pursuit of vengeance rather than measures taken to repel the original assault." And when, as heretofore shown, the counter assault is so fierce that the original assailant cannot comply with this requirement, then, in the language of *Lord Hale*, "He that first assaulted hath done the first wrong and brought upon himself this necessity, and shall not have the advantage of his own wrong to gain the favorable interpretation of the law, that that necessity which he brought on himself should, by way of interpretation, be accounted a flight to save himself from murder or manslaughter."

The doctrine as stated has been applied or recognized as sound in principle in well considered cases here and elsewhere and is given also in

text-books of approved excellence. *S. v. Pollard,* 168 N. C., 116; *S. v. Dove,* 156 N. C., 653; *S. v. Kennedy,* 91 N. C., 572; *Parker v. The State,* 88 Ala., 4; *S. v. Silas Darling,* 202 Mo., 150; *S. v. Smith,* 37 Mo. App., 137; *S. v. Hawkins,* 18 Ore., 476; *Kuney v. The People,* 108 Ill., 519; *S. v. Benham,* 23 Iowa, 154; 1 McLean Crim. L., sec. 309; Clark's Crim. L., p. 183; 25 A. and E., pp. 270-271.

In 1 Hawkins Pl. Cr., p. 87, the learned author states the position in even stronger terms, as follows (ch. 11, sec. 7): "According to some good opinions, even he who gives another the first blow, in a sudden quarrel, if he afterwards do what he can to avoid killing him, is not guilty of felony. Yet such a person seems to be too much favored by this opinion, inasmuch as the necessity to which he is at last reduced was at first so much owing to his own fault."

The charge of his Honor, then, was in strict accord with the doctrine as it obtains in this jurisdiction, and, this being true, we may not approve the argument urged upon us by the learned counsel, that a man who wrongfully brings on a fight may maintain the position of perfect self-defense because, at the precise time of the homicide, he was "sorely pressed" and could not abandon the combat with any proper regard for his safety, citing *Ingold's case,* 49 N. C., 217. According to the testimony, as it has been evidently accepted by the jury, his client, "armed with a deadly weapon, wrongfully began the difficulty by slapping the deceased in the face, and he never at any time after that ceased the combat or gave any sign of doing so. The statement in his own testimony that he said, "Get off me, boys," two or three times, and then, "Get off me, or I'll shoot you off," presents him in no such attitude as the law requires to restore his right of perfect self-defense, and while, according to his own account, he was being "sorely pressed" at the precise time of the killing, it was a necessity brought about by his own wrong, and, in our opinion, under the law and the testimony, he has been properly convicted.

True, there are numbers of decisions on this subject, and by courts of high repute, that the requirement that one in the wrong at the beginning shall cease the combat in good faith and signify this to his adversary before the right of self-defense is restored to him, should only apply when the original assault wos felonious, or at least of a character importing menace of death or great bodily harm; but in many of these the person indicted had been convicted of the offense of murder and the courts were dealing chiefly with the right to a new trial of that supreme issue, and may not have been specially attentive to the right of self-defense. This was, perhaps, true in *Ingold's case,* cited by counsel; but to the extent that *Ingold's case* gives countenance to the principle that one who has wrongfully commenced a fight may maintain the position of perfect

self-defense because, at the time, he is "sorely pressed," and without having given any intimation of his purpose to abandon the combat, the same is not in accord with our later decisions, and may be considered as disapproved. The case of *Foutch v. State,* 95 Tenn., 711, reported in 45 L. R. A., 687, and *S. v. Gordon,* 191 Mo., 114, reported in 109 Am. St. Reports, are to the effect that mere opprobrious or insulting words, though resulting in a difficulty, should not, of themselves, be held to deprive a man of the right of self-defense; decisions that are not apposite to the facts presented in this record and which may not, in all cases and necessarily, antagonize the principles we approve in the disposition made of the present appeal.

On the second exception the prayer of defendant in reference to the dying declarations is taken, in exact terms, from the opinion in *S. v. Williams,* 67 N. C., pp. 13-14. An examination of the case, however, will disclose, as suggested in the argument of the State's counsel, that the learned judge, in excluding certain declarations, was stating in general terms the reasons for receiving such declarations in evidence and as a caution to courts in reference to their admissibility, and was not intending to lay down any special formula in which the caution should be expressed in a charge to the jury. In the present case the judge did caution the jury, reminding them that the declarations were not made under oath nor at a time when deceased could have been subjected to cross-examination, and instructed the jury that "having been made in the fear of impending death and after hope of life was gone, the law says they may be given such weight, if the jury sees fit to do so, as they would have received if they had been made under sanction of an oath. The law says that no superstitious effect is to be given a statement because it is a dying declaration."

While these declarations are to be weighed with caution, and the judge should so tell the jury, the way in which the caution should be expressed is, to a great extent and very properly, left to the discretion of the trial judge, and in this instance the charge of his Honor is not dissimilar to the form approved in *S. v. Whitson,* 111 N. C., 395.

There has been no reversible error made to appear, and the judgment of the court is affirmed.

No error.

STATE EX REL. ATTORNEY-GENERAL v. NOLAND KNIGHT.

(Filed 24 May, 1915.)

1. Constitutional Law—Suffrage.

Suffrage is not a natural or inherent right, and being a privilege conferred by the State, the Constitution, Art. VI, sec. 1, by conferring this right upon males alone, excludes females from the exercise thereof.

2. Same—Woman Suffrage—Males.

Article VI, sec. 7, only provides for the eligibility of voters to office, except those disqualified by Article VI, sec. 8, which latter section refers to males who deny the existence of God, or who have been convicted of crime; and while the word "persons" appearing in said section 8 is comprehensive enough to include women, by correct interpretation it properly refers to males upon whom the right to vote is conferred by Article VI, sec. 1, with the disqualification stated in section 8, and the maxim, *Expressio unius est exclusio alterius*, obtains.

3. Constitutional Law—Public Offices — Notaries Public — Interpretation of Statutes.

The position of notary public is a public office, so recognized by common law and by proper interpretation of the Revisal, secs. 2347, 2348, 2350, 2351, and 2352, and so regarded by the various departments of our State Government, inclusive of the decision of the Supreme Court, until the enactment of chapter 55, Public Laws of 1915.

4. Constitutional Law—Public Office—Oath of Office—Test—Notaries Public.

The requirement of an incumbent to take the oath to support the Constitution is not held to be the test of whether a position under the State Government is an office, but, were it otherwise, the position of notary public requires this oath, and it would nevertheless be an office within the meaning of the Constitution.

5. Constitutional Law—Public Office—Extent of Duties—Test—Notaries Public—Judicial Acts—Clerks of Courts—Certificates.

The extent of the power exercised by one holding a public position is not determinative of the question of whether such position is an office within the meaning of the State Constitution, but whether the power in fact exists; and in many respects the functions exercised by a notary public are of a judicial character (Revisal, sec. 2359), and objection that such are exercised alone by the clerk in certifying and adjudicating the probate is untenable.

6. Constitutional Law — Public Office—Notaries Public—Trust and Profit—Woman Suffrage—Legislative Power.

All offices, whether named by the Legislature or by the Constitution, fall within one of the departments of the State Government and exist under the Constitution and subject to its restrictions; and the position of notary public being a public office, within the meaning of the Constitution, the Legislature are without authority to declare it only a "place of trust and profit," and thus enact that women, who are not voters and therefore ineligible to hold an office, may qualify to the position of notary public. *Semble*, the Legislature has not made any change in the law by stating that the position of notary public is a place of trust and profit.

7. Constitutional Law—Legislative Acts—Interpretation—Power of Courts.

It is required of the courts in the exercise of their sworn duty, to uphold the Constitution of the State, and when the constitutionality of a legislative act is questioned, the courts will place the act side by side with the Constitution, with the purpose and desire to uphold the act if it can reasonably be done; but if there be an irreconcilable conflict between the two, to that extent will the act be declared unconstitutional.

CLARK, C. J., dissenting; BROWN, J., dissenting in part.

APPEAL by plaintiff from *Webb, J.*, at March Term, 1915, of BUNCOMBE.

This is an action instituted by the State upon the relation of the Attorney-General against the defendant, a married woman, to inquire into and test her right to hold the position of notary public under chapter 12 of the Public Laws of 1915, which provides: "That the Governor is hereby authorized to appoint women as well as men to be notaries public, and this position shall be deemed a place of trust and profit, and not an office."

There was a judgment in favor of the defendant, and the State appealed.

T. W. Bickett, Attorney-General, for the State.

Martin, Rollins & Wright and John A. McRae for defendant.

ALLEN, J. There are five questions directly or indirectly involved in this appeal:

1. Is a woman voter in North Carolina?
2. If not a voter, is she eligible to office?
3. Is the position of notary public a public office?
4. If an office, can the General Assembly affect its character by calling it a "place of trust and profit," without changing its functions?
5. Has this Court the power to say that the General Assembly has exceeded its authority, and that the act passed by it is unconstitutional?

The right to hold the position of notary public is of slight moment to the women of the State or to the public, but it is of supreme importance that these questions shall be correctly decided, because they involve constitutional principles, and we approach their consideration mindful of our duty to declare what the law is, and not what we would have it to be, and of our obligation to maintain and uphold the Constitution until it is changed by the people, in whose hands the power of amendment rests.

1. *Is a woman a voter in North Carolina, and can she be one without constitutional amendment?*

The law writers agree that the right of suffrage is not a natural or inherent right, and that it is a privilege conferred by the State.

Judge Cooley in his treatise on Constitutional Law, page 260, says: "Suffrage cannot be the natural right of the individual, because it does not exist for the benefit of the individual, but for the benefit of the State itself. Suffrage must come to the individual, not as a right, but as a regulation which the State establishes as a means of perpetuating its own existence, and of insuring to the people the blessings it was intended to secure. Suffrage is never a necessary accompaniment of State citizenship, and the great majority of the citizens are always excluded, and are represented by others at the polls"; and in 15 Cyc., 280, the editor sums up the authorities in the following statement of the law: "In all periods and in all countries it may be safely assumed that no privilege has been held to be more exclusively within the control of governmental power than the privilege of voting, each State in turn regulating the subject by sovereign political will. The right of suffrage once granted may be taken away by the exercise of sovereign power, and if taken away, no vested right is violated or bill of attainder passed. None of the elementary writers include the right of suffrage among the rights of property or of person. It is not an absolute, unqualified personal right, but is altogether conventional. It is not a natural right of the citizen, but a franchise dependent upon law, by which it must be conferred to permit its existence."

If, therefore, the right to vote is not a natural right, but one conferred by law, only those can exercise the privilege upon whom it is conferred, and when we turn to our Constitution, Article VI, section 1, we find it provided that "Every male person born in the United States, and every male person who has been naturalized, 21 years of age, and possessing the qualifications set out in this article, shall be entitled to vote at any election by the people in the State, except as herein otherwise provided"; and as the privilege of voting is not a natural right and is conferred on males alone, this, of course, excludes females.

The exact question was considered in *Spencer v. Board,* 29 A. R., 582; *Gougar v. Timberlake,* 148 Ind., 38, and in *People v. Barber,* 48 Hun., 198, and it was held in each that women are excluded from voting under a constitution which confers the right to vote on males; and in *Minor v. Hoppersett,* 88 U. S., 162, the whole decision rests upon the assumption that this is the law.

2. *If not a voter, can a woman hold office in North Carolina?*

We turn again to the Constitution, and find it provided in Article VI, section 7, that "Every voter in North Carolina, except as in this article disqualified, shall be eligible to office," and the construction placed upon this section by our Court in an opinion written by *Chief Justice Clark* in *Pace v. Raleigh,* 140 N. C., 65, is that no one can hold office who is not a voter. He says in that case: "Nor have we been inadvertent to the

fact that under the former constitutional provision one who was an elector, that is, qualified to register, was eligible to office, though not registered, and that under the amendment no one is eligible to office unless he is a voter."

The language, "except as in this article disqualified," refers to voters (males) who deny the existence of God, or who have been convicted of crime. (Art. VI, sec. 8.) In other words, voters are eligible to office except as *they* are disqualified, and the word "persons" appearing in section 8, while comprehensive enough to include women, only applies to voters, as they are the only persons referred to in the article.

This is the construction placed on these sections of the Constitution in *Lee v. Dunn*, 73 N. C., 602, which is cited with approval in *State ex rel. Attorney-General v. Bateman*, 162 N. C., 588. The Court says: "The Constitution, Art. VI, sec. 1, prescribes the qualification of voters to be as follows: 'Every male person, etc., 21 years old or upwards, who shall have resided in this State twelve months next preceding the election and thirty days in the county in which he offers to vote, shall be deemed an elector.'

"The fourth section is as follows: 'Every voter, except as hereinafter provided, shall be eligible to office,' etc.

"The exception above is contained in the fifth section, as follows: 'The following classes of persons shall be disqualified for office: First, all persons who shall deny the being of Almighty God. Second, all persons who shall have been convicted of treason, perjury, or of any other infamous crime, or of corruption or malpractice in office, unless such person shall have been legally restored to citizenship.'

"So that every voter who does not deny the being of God, and has not been convicted of crime, is eligible to office in this State. And this comes so near including every man that it may be said that almost every man is eligible to office; that is to say, is electable, if the people choose to elect."

This statement of the law is in accord with authority elsewhere.

In Mechem on Public Officers, sec. 64, the author says: "The right to hold a public office under our political system is not a natural right. It exists, where it exists at all, only because and by virtue of some law expressly or impliedly creating and conferring it"; and in section 69: "Where no limitations are prescribed, however, the right to hold a public office under our political system is an implied attribute of a citizen and is presumed to be coextensive with that of voting at an election held for the purpose of choosing an incumbent of that office; those and those only who are competent to select the officer being competent to hold the office"; and in *S. v. Murray*, 28 Wis., 96, the Court says: "We have already seen that the grounds upon which a person not an elector is

excluded from holding public office is that the powers and functions of a free and independent government must be exercised by those by whom such government was instituted, that is, by the electors thereof. So if a person who is not an elector attempts to exercise the functions of a public office, the courts, upon proper proceedings being instituted for that purpose, will oust him."

This conclusion that only voters are eligible to office under our Constitution is an application of the maxim, *Expressio unius est exclusio alterius,* of which the Supreme Court of Illinois said, in *People v. Hutchison,* 172 Ill., 498, quoting from *S. v. Wrightson,* 56 N. J. L., 201: "In the construction of statutes it is a cardinal rule, which applies as well to constitutional provisions, that when the law is in the affirmative, that a thing shall be done by certain persons or in a certain manner, this affirmative matter contains a negative that it shall not be done by other persons or in another manner, upon the maxim, *Expressio unius est exclusio alterius.* 1 Plow., 206; 9 Bac. Ab., 235; Sedg. Stat. Con., 30."

Under this rule, as the Constitution says affirmatively that "Every voter, etc., shall be eligible to office," the affirmation contains the negative that no one except a voter can hold office.

It follows that as a woman is not a voter, she is not eligible to office.

3. *Is the position of notary public an office?*

What is the definition of notary public as given by the lexicographers? Black's Law Dictionary: "A public office whose functions are," etc. Bouvier's Law Dictionary: "An officer appointed by," etc. The Century: "A public officer authorized," etc. Webster: "A public officer who," etc.

What do the text-writers on the law say? Mechem on Public Officers, sec. 47: "A notary public is a public officer." 21 A. and E. Enc. Law, 555: "The office of a notary public is a public office." 29 Cyc., 1068: "The office of a notary public has long been known both to the civil and to the common law. It exists and is recognized throughout the commercial world, and has been said to be 'known to the law of nations.' It is a public office, being in most of the States a State office, although in few States it has been regarded as a county office, and its functions, once simple, have now a wider scope."

That the position was recognized as an office at common law is shown by the following, taken from 5 Comyn's Dig., 140, when speaking of protests of bills of exchange: "The protest must be made by a public notary upon all foreign bills of exchange, because he is a *public officer* to whom credit is given"; and by the opinion of *Buller, J.,* in *Lefty v. Mills,* 4 T. R., 175 (1791), that "The demand of a foreign bill must be made by a notary public, to whom credit is given, because he is a *public officer.*" (Italics ours.)

What is the opinion of the judges?

In each of the following cases it is held that a notary public is a public officer: *Emmerling v. Graham,* 14 La. Ann., 389; *S. v. Davidson,* 92 Tenn., 531; *Loan Co. v. Turrell,* 19 Ind., 469; *Opinion of Justices,* 150 Mass., 586; *S. v. Hodges,* 107 Ark., 272; *Pierce v. Indseth,* 106 U. S., 546; *Ohio Natl. Bank v. Hopkins,* 8 App. Cases (D. C.), 146; *Kirksey v. Bates,* 7 Porter (Ala.), 529; *S. v. Adams,* 58 Ohio, 612; *Grevnor v. Gordan,* 15 Ala., 72; *Sanfield v. Thompson,* 42 Ark., 46; *Smith v. Meador,* 74 Ga., 416; *Browne v. Bank,* 6 S. and R. (Pa.), 484; *Keeny v. Leas,* 14 Iowa, 546; *Britton v. Nichols,* 104 U. S., 766; *People v. Rathbone,* 135 N. Y., 434; *Bettmen v. Warwick,* 108 Fla., 47; *Ashcraft v. Chapman,* 38 Conn., 232; *Opinion of Justices,* 73 N. H., 621; *S. v. Clarke,* 21 Nev., 335; *Charst v. Transit Co.,* 115 Mo., 409; *Carroll v. State,* 58 Ala., 396.

We quote from only a few of these citations, but all are to the same effect.

In the case from Connecticut *Chief Justice Butler* says: "Notaries were originally mere commercial scriveners. Becoming important to the commercial world, their appointment was provided for and their duties regulated by public law, and they became sworn public officers."

In the case from New York: "The very designation of 'notary public' indicates a relation the office sustains to the body politic. It is impossible to regard him as other than a public officer."

In the case from Indiana: "A notary public is a public officer. The office originated in the early Roman jurisprudence, and was known in England before the Conquest."

In the case from District of Columbia: "It is a well known attribute of a notary public that he is a public officer, recognized as such by the common law and the law of nations."

In the case from 106 U. S., 546: "The Court will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world."

The executive, legislative, and judicial construction in this State also favors the view that the position of notary public is a public office:

The executive, because until the last General Assembly met no woman had been appointed by the Governor a notary public, except in one instance, and then by mistake, as only the initials of the person applying for appointment were given, and when the mistake was discovered the commission was withdrawn.

The legislative, because for more than one hundred years the position has been spoken of in the statutes as an office.

The earliest reference to the position we have been able to find is in the Acts of 1777, vol. 1, Laws of N. C., ch. 118, sec. 15, which provides

that "The Governor, for the time being, shall . . . appoint one or more persons . . . to act as notary or notaries, . . . who shall take the oath appointed to be taken for the qualification of *public officers* and also an oath of office."

In the Revised Statutes of 1836-7 it is provided that "The Governor may, from time to time, at his discretion, appoint one or more fit persons in every county to act as notaries, who, on exhibiting their commission to the county court of the county in which they shall act, shall be duly qualified by taking before said court an *oath of office* and the oaths prescribed for *officers.*" This section was reënacted in the Revised Code of 1854, ch. 75, sec. 1, and in the Revisal of 1905, sec. 2347, except in the latter act it is added: "who shall hold *their office* for two years from and after the date of their appointment." (Italics ours.)

By the judicial, because in *Long v. Crews,* 113 N. C., 256, it was held that the probate of a deed in trust before a notary public who was a preferred creditor was invalid, upon the principle of the common law that no one can sit in judgment upon his own cause, and the present *Chief Justice,* writing the opinion, says for the Court: "The attempted acknowledgment of the deed in trust before a notary public who was a preferred creditor therein *was before an officer* disqualified to act, and hence a nullity," and the same learned judge says, in *Smith v. Lumber Co.,* 144 N. C., 49: "That the *officer, here a notary public,*" and in his concurring opinion in *Nicholson v. Lumber Co.,* 160 N. C., 37: *"It cannot be doubted that a notary public is a public office."* (Italics ours.)

The only expression we have found in our reports apparently in conflict with these authorities is in *Worthy v. Barrett,* 63 N. C., 199, in which an opinion of the Attorney-General of the United States of 1867 is quoted, which classifies notaries public among those positions that are not offices.

The case of *Worthy v. Barrett* was this: Worthy was elected sheriff of Moore County in 1868, and the commissioners of the county refused to induct him into office because he had been sheriff of the county before and during the war, and the question presented to the Supreme Court was whether he was an officer within the meaning of the Reconstruction Acts, and therefore disqualified until his disabilities had been removed.

The Court held that he was an officer because he was required to take an oath to support the Constitution, saying: "The oath to support the Constitution is the test," and quoted the opinion of the Attorney-General in support of this position, because he said in his opinion, in speaking of county offices: "I have arrived at the conclusion that they are subject to disqualification if they were required to take as part of their official oath the oath to support the Constitution of the United States."

We do not concur in the view that the oath to support the Constitution is the test, but if this should be adopted and the point decided in this case of *Worthy v. Barrett* approved, it would be decisive against the defendant, because notaries public, both before and since the act of 1915, now under consideration, have been and are required to take an oath to support the Constitution.

The opinion quoted in the case by the Attorney-General of the United States, that notaries are not public officers, is also in direct conflict with the opinion of the Supreme Court of the United States in *Pierce v. Indseth,* 106 U. S., 546, thereafter decided, that notaries "are officers recognized by the commercial law of the world."

The case of *Lawrence v. Hodges,* 92 N. C., 672, has, in our judgment, no bearing upon the question involved in this appeal. It was held in that case that it was competent for the Legislature to authorize clerks of the Superior Court to act as notaries public, and this is no more than an application of the principle stated by *Associate Justice Brown* in *McCullers v. Comrs.,* 158 N. C., 80, of simply annexing additional powers and duties to an office already existing. He says, among other things: "This legislation is not novel in North Carolina. . . . In 1901 the Legislature passed a similar act. . . . We also have the familiar case of the Governor, who is made by law a trustee of the University of the State and chairman of the board, and is required to perform these duties and also act as chairman of the executive committee of the trustees. . . . In West Virginia the law requires the Governor, Auditor, Treasurer, Superintendent of Schools, and Attorney-General to serve on the Board of Public Works, and prescribes the duties of said board. The Court of Appeals in an elaborate opinion held the act valid, saying, in substance, it simply prescribes additional powers to be performed by officers already elected by the people, and that it does not amount to an appointment to an office created by law, but that it only amounts to requiring the officers of the executive department, by virtue of their respective offices to which they have been elected by the people, to act as members of the Board of Public Works; that it in substance simply annexes additional powers and duties to their respective offices. . . . We could multiply authorities in support of these views."

We have no means of knowing the opinion of the Attorney-General of the State except from his public conduct and public utterances. He is a plaintiff in the action, and filed a complaint alleging that the defendant was unlawfully using the powers and duties of the position of notary public, and, when there was an adverse judgment against him in the Superior Court, appealed to this Court, and upon the argument strenuously insisted that the act of the General Assembly passed in 1915 was invalid if the position of notary public was a public office prior to its

enactment, and that the only debatable question was whether it was a public office, and he cited perhaps twenty authorities holding the position to be a public office.

The Governor has declined to make more than one appointment until the courts have determined the validity of the act.

We have, then, the opinion of a General Assembly which refused to pass the act until the Governor had agreed that he would make only one appointment before its constitutionality was determined; the opinion of the Governor, who has made only one appointment, and then for the purpose of presenting the question to the courts, and the opinion of the Attorney-General, if he has given one, who is a plaintiff in the action and is seeking to oust the defendant from office.

Is it not clear that these officials have not expressed any opinion, and that they have simply acted so that the question might be considered, and have placed the responsibility of final decision upon the courts?

It is but fair and just to the Attorney-General to say that he has acted in this matter as he has in all others coming before our Court. He is always candid and presents his contentions with learning and ability; but he feels that it is his duty to give the Court the benefit of all authority he finds, whether in support of his contention or not.

It is also suggested that women are admitted to practice law in this State, and that lawyers are officers and are required to take oaths to support the Constitution, and, in addition, an oath of office; but as is said in 4 Cyc., 898: "An attorney does not hold an office in the constitutional or statutory sense of that term, but is an officer of the court, exercising a privilege or franchise."

If, however, we discard the definition of the term and the opinion of the law writers and of the judges, and the construction placed upon it by the different departments of State, and apply the test of the functions to be performed by the incumbent of the position, we reach the same conclusion.

In Mechem on Public Officers, sec. 1, it is said that an office is "a public position to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public," and this definition was adopted and approved in a unanimous opinion of this Court in *State ex rel. Wooten v. Smith,* 145 N. C., 467, and again at this term in *Groves v. Barden, ante,* 8, and in the latter case it was also said that the performance of an executive, legislative, or judicial act is the test of a public office.

The extent to which the power may be exercised is not material. It is the fact that the power exists which is determinative. It was held in *Midgett v. Gray,* 159 N. C., 443, by the unanimous opinion of the Court,

that the position of school committeeman is a public office, and although the scope of the duties are confined, the position was regarded of such importance that its acceptance vacated the office of clerk of the Superior Court under the constitutional provision forbidding the holding of two offices.

One of the duties which a notary public may perform is taking the probate of deeds, and this is a judicial act.

In *Paul v. Carpenter,* 70 N. C., 508, *Rodman, J.,* speaking for the Court, says: "To take the acknowledgment and privy examination of a *feme covert* to a deed conveying her land is a judicial act"; and in *White v. Connelly,* 105 N. C., 68, *Associate Justice Clark* says: "Admitting to probate is a judicial act," and this is approved in *Piland v. Taylor,* 113 N. C., 1, and in *Long v. Crews,* 113 N. C., 256.

"The officer who takes an acknowledgment (of the execution of a deed) acts in a judicial character in determining whether the person representing himself to be, or represented by some one else to be, the grantor named in the conveyance actually is the grantor. He determines further whether the person thus adjudged to be the grantor does actually and truly acknowledge before him that he executed the instrument." *Wasson v. Connor,* 54 Miss., 352. "It is well settled that the certificate of a judge or a justice of the peace of the acknowledgment of a deed or mortgage is a judicial act. Conceding such to be the effect of a certificate of a judge or justice, yet it was contended on the argument that like effect should not be given to the certificate of a notary. Why not? He is a public officer, commissioned by the Governor. He is acting under oath, like other officials in the performance of judicial duties. Whatever officer is authorized to take the acknowledgment, to him is given a judicial act." *Com. v. Haines,* 97 Pa. St., 228.

The defendant contends, however, that if it is conceded that the probate of a deed is a judicial act, the judicial function is performed by the clerk, and not by the notary public; that the notary takes and certifies the evidence, and the clerk upon this certificate adjudicates the probate.

The authorities are, in our opinion, against this position. In section 989 of the Revisal it is provided that "The execution of all deeds of conveyance, etc., may be proven or acknowledged before any one of the following officials of this State: the several justices of the Supreme Court, the several judges of the Superior Court, commissioners of affidavits appointed by the Governor of this State, the clerk of the Supreme Court, the several clerks of the Superior Courts, the deputy clerks of the Superior Courts, the several clerks of the criminal courts, notaries public, and the several justices of the peace."

In this section notaries are not only classified among the *officials of the State,* but among its judicial officers, and all acquire jurisdiction to

take the proofs and acknowledgments of deeds from the same source and in the same language.

If so, by what rule of construction can it be said that a judge or clerk is exercising a judicial power when taking the proof or acknowledgment of a deed, and that a notary is not?

Again, the respective duties of the notary public and the clerk in admitting to probate, when both act, show that the notary is required to exercise discretion and judgment, while the duties of the clerk are mechanical and clerical.

The notary is not required to certify the evidence, but "to take and certify the acknowledgment or proof" (Rev., sec. 2359), and this imposes upon him the duty of ascertaining (1) that the persons who present themselves are the grantors in the deed; (2) that they acknowledge the execution of it; (3) that the wife signed the deed freely and voluntarily, and that she voluntarily assents thereto; while, on the other hand, the clerk is only required to examine the certificate and adjudge that it is correct and order registration, which only renders it necessary to compare the certificate of the notary with the form prescribed by statute for the purpose of seeing if they are substantially alike.

This position is, we think, fully sustained by *Young v. Jackson,* 92 N. C., 147, and *Darden v. Steamboat Co.,* 107 N. C., 446, in which it was held that the probate and registration of a deed was valid without an adjudication by the clerk that it was in due form and without an order of registration, this requirement of the statute being held to be directory.

In the *Jackson case* the Court says: "The important thing required with a view to registration is that the deed or other instrument requiring registration shall be proven before a tribunal or officer authorized by law to take and certify the probate"; and in the *Darden case:* "We therefore hold that where an acknowledgment or proof of the execution of a deed or other paper required or allowed to be registered is lawfully taken by any officer other than the clerk of the Superior Court of the county where the land lies, it is not essential to the validity of its registration that the latter should add an adjudication or order of registration to the certificate and fiat of the officer taking the probate."

It is true that in both of these cases the probate was taken before a clerk of the Superior Court, but in a county other than that in which the land was situate, and the authority of such officer in regard to probate is derived from the same source as is the authority of a notary, and is no greater, and the cases make no distinction between the positions in this respect, the language in one of the cases being "before a tribunal or officer," and in the other, "before any officer." These cases were decided before the enactment of section 999 of the Revisal, but that does not affect them as authority for the position that taking proof is judicial.

If, therefore, admitting to probate is a judicial function, and the duties imposed upon the clerk are directory and not mandatory, it would seem that the performance of the judicial act is with the notary.

There is no conflict between these decisions and the case of *Evans v. Etheridge*, 99 N. C., 47, because in the latter case the Court was dealing with the certificate of a commissioner of affidavits of another State under a statute which required the clerk, when acting upon the certificate of a commissioner, to "adjudge such deed or other instrument to be duly acknowledged or proved in such manner as if made or taken before him."

Another important function of a notary public is the power to protest commercial paper, and here his act, attested by his notarial seal, is recognized at home and abroad, because he is a public officer, and the maxim, *Omnia presumuntur esse rite acta*, which is applied to the acts of officers and not to those of the private individual, prevails. "The protest must be made by a notary public upon all foreign bills of exchange, because he is a public officer to whom credit is given." 5 Comyn's Dig., 140. "The demand of a foreign bill must be made by a notary public, to whom credit is given because he is a public officer." *Lefty v. Mills*, 4 T. R., 175. "The notary is a public officer commissioned by the State, and possessing an official seal, and full faith and credit are given to his official acts, in foreign countries as well as his own." 2 Dan. Neg. Inst., sec. 934. "Notaries are public officers of the whole commercial world." *Sanfield v. Thompson*, 48 A. R., 51.

"As public officers, notaries are entitled to the presumption of law in their favor that they have performed their duty, unless the contrary appears. . . . Every intendment is to be in favor of the fair performance of his duty by the notary." *McAndrew v. Radway*, 34 N. Y., 514.

Again, we said in *Groves v. Barden* that while the final test of an office was the performance of a judicial, executive, or legislative act, that there were the following evidences as to the character of the position: "That an oath to support the Constitution is required, or that a bond for the faithful performance of duties must be executed, or that the duties are prescribed by law and not regulated by contract, or that the incumbent discharges independent duties and is not acting under the direction of others, or that the duties are permanent in their nature and not occasional and intermittent, and that the term is fixed and continuing and not temporary, or that the position is named an office or an employment in the statute creating it."

It will be found upon comparison that all these evidences were present as to the position of notary public prior to the passage of the act now before us, except the giving of a bond.

He is required to take an oath to support the Constitution; his duties are prescribed by law and not regulated by contract; he performs inde-

pendent duties and does not act under the direction of others; his duties are continuing and permanent; the term is fixed, and, until the last General Assembly met, the position had been called an office in all legislative acts since 1777.

It is also evident that in the opinion of the General Assembly of 1915 it was an office. If not, why pass the act at all? The Governor has power under the general law to appoint notaries, and if not an office, he could have appointed women to the position before the act was passed; and if this was the opinion of the General Assembly, that it was not an office, the act is no more than a suggestion or advice to the Governor. It was because the position was known and recognized as an office that the words were added to the act, "and this position shall be deemed a place of trust and profit, and not an office," meaning it is an office now, but "shall be" hereafter a place of trust and profit.

It is also significant that the General Assembly, in passing the act of 1915, did not undertake to amend chapter 55 of the Revisal, entitled "Notaries," and it leaves that chapter unimpaired, unless repealed by implication.

That chapter provides: "The Governor may . . . appoint one or more fit persons in every county to act as notaries, who shall hold their office for two years . . . and shall be duly qualified by taking before said clerk an oath of office and the oaths prescribed for officers" (sec. 2347); "The Governor shall issue to each a commission" (sec. 2347); "Notaries public shall have power to take and certify the acknowledgment or proof of deeds, etc.; to take depositions and to administer oaths and affirmations in matters incident to or belonging to the duties of their offices; and to take affidavits to be used before a court, judge, or other officer within the State, and shall have full power to take the privy examination of *femes covert*" (sec. 2350); "Notaries public shall have full power and authority to perform the functions of their office in any and all counties of the State, and full faith and credit shall be given to any of their official acts" (sec. 2350); They are required to state after their official signature the date of the expiration of their commissions, but the failure to do so shall not thereby invalidate "their official acts" (sec. 2351); "Official acts by notaries shall be attested by their notarial seals" (sec. 2352).

It seems, therefore, to be established, by every test that can be applied, that heretofore the position of notary public has been a public office.

4. *If an office, can the General Assembly, by calling it a "place of trust and profit," without changing the functions, affect its character?*

The contention of the defendant is that as the position of notary public is not named in the Constitution, and is created by statute, that the qualifications for holding office named in the Constitution do not apply

to it, and that the General Assembly may determine who can hold the position. In other words, that as the position is created by the Legislature, the constitutional provision as to holding office does not apply to it.

We cannot approve this position without following it to its logical conclusion, and to do so it must be applied to all offices not named in the Constitution and created by legislative act, and as to them we must hold that the Legislature may call them "places of trust and profit" and say who may hold them, without regard to the Constitution.

There is no such classification of offices as large and small, and we cannot yield to the suggestion that the position of notary public, if an office, is not of great importance, and that therefore we may hold that the constitutional qualifications for office do not apply to that position and stop, because when this case is decided it becomes a precedent, and as said by Disraeli, "A precedent embalms a principle." If the principle is not safe and sound, we may well adopt the words of Portia, who replied, when urged to do a little wrong that great good might come of it.

> 'Twill be recorded for a precedent;
> And many an error by the same example,
> Will rush into the State. It cannot be.

Let us, then, see to what conclusions the principle naturally and inevitably leads, and, first, as to the offices to which it must be applied.

We find among the offices created by legislative act, now in existence, and not mentioned in the Constitution, three Corporation Commissioners, a Commissioner of Agriculture, an Insurance Commissioner, a Commissioner of Labor, the directors and superintendent of the State's Prison, the State Librarian, the Marshal of the Supreme Court, the Keeper of the Capitol, the members of the Historical Commission, the Assistant Attorney-General, mayors, aldermen, police justices, and constables; and, if the position of the defendant is sustained, the General Assembly may call all of these "places of trust and profit" and may say that women can hold them.

This would produce an anomalous condition, as a woman could hold the position of Commissioner of Agriculture, because created by the General Assembly, and could not be Superintendent of Public Instruction, because named in the Constitution; she could be a Corporation Commissioner and not a coroner; she could be Insurance Commissioner and not a county surveyor.

This, however, would not be the end, because if the principle is once admitted that the provisions in the Constitution as to qualifications for office do not apply to offices created by the General Assembly, it follows logically that the qualifications for voters in the Constitution do not apply to such offices, and the General Assembly would not only have the power to say that women could vote for all of these positions, but it could

also strike down the educational and other qualifications of voters as to these offices, because the contention is as to offices created by the Legislature that they are under the control of the Legislature and not under or bound by the limitations in the Constitution.

This would be in direct conflict with the decision in *Van Bokkelen v. Canady,* 73 N. C., 198, in which the Court had under consideration Article VI, section 1, of the Constitution of 1868, of which Article VI, section 1, of the present Constitution is an exact copy, and it was there held that the qualifications of electors prescribed by the Constitution applied to all elections, the Court saying: "The Constitution provides that every male person 21 years old, resident in the State twelve months and in the county thirty days, shall be an elector (Art. VI, sec. 1). An elector for what? The Constitution does not say for what. Does it mean for President, or for members of Congress, or for Governor, or for judges, or for members of the General Assembly, or for county officers, or for township or town officers, or for what else? There it stands by itself, without explanation; that every such person shall be an elector—a voter. It evidently means to designate those persons as a *class,* to vote generally whenever the polls are opened and elections held for anything connected with the General Government or the State or local government."

Again, this construction would place it in the power of the General Assembly to nullify Article XIV, section 7, of the Constitution, forbidding the holding by one person of two offices, because the Legislature could simply say that a particular position was not an office, but an employment, and thereby enable one to hold two positions now known as offices.

We cannot think that the framers of the Constitution intended such a result.

The Revolution of 1776 was largely a protest against the exercise of arbitrary power, and one of the principal reasons for adopting a written Constitution was that limitations should be placed upon the exercise of power, and it is said in our Constitution, Art. I, sec. 37, that "all powers not herein delegated remain with the people." The Constitution is intended to be permanent, and was adopted not only to meet conditions then existing, but for the future, and it was the purpose of the people that it should remain unimpaired until changed by the people themselves.

It is not an enemy to progress, but as it is the result of deliberate consideration and mature judgment, first expressed in convention and then approved by the people, it is so framed that it cannot be changed in a day; the people, then, agreeing upon the fundamental law for the present and the future, and knowing that times of agitation and popular clamor would come, while reserving the power of amendment, in their wisdom

imposed a restraint upon themselves by making the powers of amendment slow enough to give time for reflection before final action.

"What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it.

"The life-giving principle and the death-doing stroke must proceed from the same hand. What are legislatures? Creatures of the Constitution; they owe their existence to the Constitution; they derive their powers from the Constitution. It is their commission, and, therefore, all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the people themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the Legislature in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature. The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, the Constitution is the sun of the political system, around which all legislative, executive, and judicial bodies must revolve. . . . The Constitution is the origin and measure of legislative authority. It says to legislatures, Thus far ye shalt go, and no further. Not a particle of it should be shaken; not a pebble of it should be removed. Innovation is dangerous. One encroachment leads to another; precedent gives birth to precedent; what has been done may be done again; thus radical principles are generally broken in upon, and the Constitution eventually destroyed. . . . Omnipotence in legislation is despotic." *Vanhorne v. Dorrance,* 2 Dal., 304.

The functions of government were distributed in the Constitution among three departments, legislative, judicial, and executive, and all authority conferred by the people is exercised under one of these departments.

As new agencies are required, the General Assembly has the power to create them, and, when no longer necessary, to abolish them; but when created, they fall within one of the departments and exist under the Constitution and subject to its restrictions.

The language of the Court in *Worthy v. Barrett, supra,* in reference to the Constitution of the United States is applicable to our own Constitution, as the two are in this respect practically identical. The Court says: "The Government of the United States is divided into three branches—legislative, judicial, and executive. These three parts make one whole. There is no other part or parcel. It follows that there can be no office in the Government that is not in one of these departments. There can be no officer unless he be the incumbent of an office. There-

fore, there can be no officer except he be in some office in one of these three departments."

If they are not under the Constitution, by what authority do they exist? It cannot be that we are living as to a part of our Government under the Constitution, and as to another part outside the Constitution, without restrictions or limitations.

It is, however, doubtful if the General Assembly has made any change in the law by stating that the position of notary public is a "place of trust and profit."

In Article XIV, section 7, of the Constitution it is provided: "No person who shall hold any office or place of trust or profit," etc., shall hold or exercise any other office or "place of trust or profit"; and in construing this language it was said, in *Doyle v. Raleigh,* 89 N. C., 136: "It is apparent from the association that 'places of trust or profit' are intended which approximate to but are not offices, and yet convey the same general level in dignity and importance. The manifest intent is to prevent double officeholding—that offices and places of public trust should not accumulate in a single person; and the superadded words of 'places of trust or profit' were put there to avoid evasions in giving too technical a meaning to the preceding words." This was affirmed in *S. v. Smith,* 145 N. C., 477, in an opinion by *Justice Brown,* in which he adds: "The most important characteristic which distinguishes an office from a public agency is that the conferring of the office carries with it a delegation to the individual of some of the sovereign functions of the Government. In this respect the terms 'office' and 'places of trust,' as used in our Constitution, are synonymous."

Both of these cases were approved at this term by the unanimous opinion of the Court in *Groves v. Barden, ante,* 8.

It is, therefore, at least debatable, conceding the power to exist, if the General Assembly made any change in the position by calling it a "place of trust and profit."

Can we find a better definition of an office than that it is a "place of trust and profit"? In 29 Cyc., 1361, it is said that "An office in the abstract sense may be defined as a duty, charge, or trust, a place of trust, a position to which certain duties are attached."

If, however, other words had been used, we are of opinion that by merely giving it a name the General Assembly has not changed the character of the position. *Wood v. Bellamy,* 120 N. C., 212.

The last case cited (*Wood v. Bellamy*) is historical.

In 1896 there was a change of administration in the State, and a new political party came into power. The General Assembly of 1897 passed an act by which it attempted to give control to the new party of different State institutions, and, among others, of the State Hospital at Raleigh. Among other things, it was provided in the act that the board of direct-

ors having charge of the institution should be abolished and that the powers, rights, and duties heretofore prescribed by law to said board shall hereafter be granted to and imposed upon a board of trustees; and it was then further provided: "It is not the intention of the General Assembly that the trustees herein provided for shall be offices within the meaning of section 7 of Article XIV of the Constitution, and they are declared to be special trustees for the special purposes of this act."

The Court, speaking of this part of the act, said: "These places have been held to be offices, as we have declared in this opinion, and the Legislature by simply declaring that they are not to be offices does not change the nature of the thing. . . . It is idle, under the decision of this Court, to say that such a position as these defendants hold is not an office, as it would be to say that a horse is not a horse because one may choose to call him some other animal."

This principle was also fully recognized and approved at this term in *Groves v. Barden, supra*, in which it was held that the name given to a position by the General Assembly was evidence of the character of the position, *but that this "was not determinative or conclusive."*

The case of *Wood v. Bellamy* is one of the officeholding cases that was not overruled by *Mial v. Ellington*, 134 N. C., 131, as is shown by the concurring opinion of *Chief Justice Clark*, who also concurred in the opinion in *Wood v. Bellamy*. He says, at page 166: "In *Wood v. Bellamy* there was an application of *Hoke v. Henderson* in a case when new incumbents were placed in offices as to which there had been no change of duties, but a change of name only. This decision was within the limits of the original decision. It was the subsequent case, beginning with *Day's case*, 124 N. C., 362, which carried it further, causing it to be denied, and its ultimate and inevitable overthrow."

The inference seems to be clear that, in the opinion of the writer, *Wood v. Bellamy* was correctly decided, and that the character of a position is not affected when there is "no change of duties, but a change of name only."

It is true, there is language in the opinion in *Brown v. Turner*, 70 N. C., 93, which sustains the contention of the defendant that the character of the position is determined solely by the fact that it is, or is not, called an office in the legislative act; but this question was not before the Court.

The point in controversy and decided was as to the power of the General Assembly to abolish the office of Public Printer and to invest a joint committee of the House and Senate with the authority to contract for the public printing.

If, however, the case is regarded as authority, it is in direct conflict with the subsequent case of *Wood v. Bellamy*, and with *S. v. Smith*, 145

N. C., 476, and *Groves v. Barden, ante,* 8, both holding that the character of the position is determined by the functions to be performed, and not by the name.

It is also expressly declared in the latter case that "the fact that the lawmaking power may have declared the position an office or employment, although not conclusive, is entitled to consideration"; and we are asked to say, in direct opposition to that opinion, that as the General Assembly has said that the position of notary public is a place of trust and profit, and not an office, that this declaration is conclusive.

There are also a number of decisions from the courts of other States of eminent learning and ability, supporting the position of the defendant that the qualifications for holding office, prescribed by the Constitution, do not apply to offices created by the Legislature, and that as to such offices the Legislature may say who may fill them; but there are two insuperable objections to following them.

In the first place, these decisions are based on the constitutions of the respective States, and in no one of these constitutions can be found the provision which is in the Constitution of our State: "Every voter, except as in this article disqualified, shall be eligible to office"; nor has it been declared by the courts of those States, as it has been with us, that "No one is eligible to office unless he is a voter." *Pace v. Raleigh,* 140 N. C., 70.

In the next place, the doctrine that offices created by the General Assembly are not under the restrictions and limitations of the Constitution was repudiated in *State ex. rel. Atty.-Gen. v. Bateman,* 162 N. C., 588.

The office of recorder or police justice is not mentioned in the Constitution, and it owes its origin and existence to legislative action, and yet it was held in the *Bateman case* that the qualifications of the Constitution for holding office applied to it, and that the General Assembly did not have the power to say that the recorder should be a licensed attorney, because this was not a qualification named in the Constitution; and if this case stands and is authority, whatever else may be deduced from it, it cannot be held that offices created by the General Assembly are not under the Constitution and not controlled by its provisions.

We are, therefore, of opinion that the General Assembly has not changed the character of the position by calling it a "place of trust and profit," and that it exceeded its power when it declared that a woman could hold the position of notary public.

5. *If so, has this Court the power to say that the General Assembly has exceeded its authority and that the act passed by it is unconstitutional?*

The text-writers and the decided cases agree that it is not only within the power, but that it is the duty, of the courts in proper cases to de-

clare an act of the Legislature unconstitutional, and this obligation arises from the duty imposed upon the courts to declare what the law is.

The Constitution is the supreme law. It is ordained and established by the people, and all judges are sworn to support it. When the constitutionality of an act of the General Assembly is questioned, the courts place the act by the side of the Constitution, with the purpose and the desire to uphold it if it can be reasonably done, but under the obligation, if there is an irreconcilable conflict, to sustain the will of the people as expressed in the Constitution, and not the will of the legislators, who are but agents of the people.

The principle is well stated in 6 Ruling Case Law, 72, that "Since the Constitution is intended for the observance of the judiciary as well as the other departments of Government, and the judges are sworn to support its provisions, the courts are not at liberty to overlook or disregard its commands, and, therefore, when it is clear that a statute transgresses the authority vested in the Legislature by the Constitution, it is the duty of the courts to declare the act unconstitutional, and from this duty they cannot shrink without violating their oaths of office. The duty, therefore, to declare a law unconstitutional in a proper case cannot be declined, and must be performed in accordance with the deliberate judgment of the tribunal in which the validity of the enactment is directly drawn in question."

The first exercise of this power in this State was in 1787, in *Bayard v. Singleton*, 1 N. C., 42, and one of the latest was in 1912, in *Commissioners v. Webb*, 160 N. C., 594, in which an act was held unconstitutional by the unanimous opinion of the Court, written by the present *Chief Justice*.

In *Sutton v. Phillips*, 116 N. C., 504, in an opinion written by *Chief Justice Clark*, the Court says: "While the courts have the power, and it is their duty, in proper cases, to declare an act of the Legislature unconstitutional, it is a well recognized principle that the courts will not declare that this coördinate branch of the Government has exceeded the powers vested in it unless it is plainly and clearly the case"; and this language was approved and affirmed in the case of *In re Watson*, 157 N. C., 349.

In 1913 an act of the General Assembly was declared to be unconstitutional in *Asbury v. Albemarle*, 162 N. C., 248, and in *Sewerage Co. v. Monroe*, 162 N. C., 275, and in each case the judge of the Superior Court sustained the constitutionality of the act, and two members of this Court dissented, *Associate Justice Hoke* and the writer of this opinion.

Between these cases that are cited, running from the first volume of our Reports to the 160th, covering a period of one hundred and twenty-five years, there could be cited fifty or more cases in which acts of the

General Assembly have been declared unconstitutional, and we find no judicial opinion to the contrary.

The legislative and executive departments have recognized the existence of this power in the courts in the passage and execution of the act now before us, because it is a part of the history of the act that, after its introduction, the General Assembly hesitated and refused to take final action until assured by the head of the executive department that only one appointment would be made until the constitutionality of the act was passed upon by the courts.

We are, therefore, of opinion, upon the whole case:

1. That a woman is not a voter in this State.
2. That as she is not a voter, she is not eligible to office.
3. That the position of notary public is a public office.
4. That being a public office, the General Assembly cannot change its character by simply making a change in the name.
5. That the act of the General Assembly declaring that a woman may hold the office of notary public is unconstitutional and void.

Our State Government and the right to hold office are based on male suffrage, and if this policy is to be changed, it must not be done by the courts, as the power to amend is reserved to the people alone. If we exercise the power, we violate the Constitution we are required to support and maintain, and establish a precedent which will furnish an opportunity to change the policy of our Government in a way not contemplated by the Constitution.

We cannot hold that a woman may hold the office of notary public, and stop. If we take the first step, we must do so upon the principle that offices created by the General Assembly are not bound by the limitations of the Constitution, and if this principle is established, we must follow it to its legitimate and logical conclusion, and apply it to all offices created by the Legislature.

We have no right to deal with the question upon ground of sentiment or personal inclination.

Our duty is performed when we declare the law as we understand it to be, giving to the subject careful consideration and exercising our deliberate judgment, and it cannot be performed otherwise.

Neither the wisdom of extending the right of suffrage to women nor their fitness to hold office is remotely involved in this appeal. These are questions which must be submitted to and determined by the people.

We have not been inadvertent to the statistics which have been urged upon our consideration. These may be important upon the question as to the desirability of changing the Constitution, but cannot aid us in the construction of our written Constitution unless it is shown that in States where women are notaries the constitutions are like ours, and this has not been done.

In some of these States women are voters and can, of course, hold any office, and in others they have qualified and restricted suffrage, and in England there is no written Constitution.

The number of questions urged upon our consideration on the oral argument and in the briefs, some of them new and important, and the propriety of giving satisfactory reasons for denying a request or demand of woman, whether addressed to the individual or to the judge, have rendered it necessary to extend the discussion further than would otherwise be required.

Reversed.

CLARK, C. J., dissenting: There is but one question presented by this appeal.

The General Assembly of North Carolina at its late session enacted chapter 12, Laws 1915, as follows: "The Governor is hereby authorized to appoint women as well as men to be notaries public, and this position shall be deemed a place of trust and profit, and not an office."

Upon this authority from the lawmaking department of the Government, to whom by the Constitution that duty is intrusted, the Governor of the State issued his commission to Mrs. Noland Knight, the defendant, as a notary public. Thereafter this *quo warranto* proceeding was brought, averring that a notary public was not a place of trust or profit, as the Legislature had enacted, but was in truth an office, and therefore that the commission issued to her by the executive department of the State under the authority of the Legislature was a nullity because she was a woman.

The action was brought before *Judge Webb* of the Superior Court, who sustained the action of the General Assembly and of the Governor, and declined to hold their acts void. On argument in this Court, the Attorney-General, while he combated some of the propositions of the defendant's counsel, admitted that the act was valid, saying then, and also in a written opinion: "In the face of the legislative declaration, there ought not to be any serious trouble about the matter."

The sole question, therefore, is, after this action of the lawmaking department and the Governor, and the admission of the relator, the Attorney General, himself, in open court, "Ought the defendant be deprived of her appointment?" There can, of course, be other questions, more or less collateral, discussed, but that is the sole question presented on this record. If she can be thus deprived, it can be done only upon the ground that the above acts of the Legislature and of the Governor are in violation of the Constitution. It cannot be contended that the Legislature acted ignorantly or unadvisedly. In that body there were many able men, among whom were lawyers of acknowledged prominence and recognized ability. They were under an oath to support the Constitution,

as much so as the members of this bench. No one will impute to that body a desire to evade or fraudulently circumvent the Constitution which they were sworn to support. No one has suggested that. The matter was fully discussed in both houses, was thoroughly understood, and the bill passed the General Assembly by a large majority in both houses.

If this Court deems it is its duty to so decree, it ought to point out the paragraph in the Constitution which gives it the power, in its opinion, to hold this action of the Legislature and the Governor in violation of the Constitution; for the Governor as well as the members of the General Assembly are under the sanction of an oath to maintain the Constitution. The act "authorized" but did not require him to appoint women notaries public.

The General Assembly of 1913 passed an act in almost identical terms authorizing the appointment of women as trustees upon the public school boards, and with the same provision, that such "position shall be deemed a place of trust and profit, and not an office." That act has been recognized without question and acted upon. One hundred and fifty women have been appointed to such positions and have discharged the duties thereof with credit to themselves and to the benefit of the public.

There is no provision of the Constitution which defines an "office," and none which creates the position of notary public. The Legislature, therefore, could not act in violation of the Constitution in drawing the line, as it did, between positions of trust or profit and offices. Certainly not, unless the duties of a notary public are of themselves so inherently an office and unless it has been so generally recognized as such that to term it not an office would be a fraud in legislation.

Every department of the State Government has always recognized that a notary public is not an office, for in this Legislature, as in preceding ones, several members were at the same time notaries. The Constitution forbids persons holding two offices at the same time. Art. XIV, sec. 7. Yet no Legislature has ever held that a member could not be a notary. The Governors (most of whom have been lawyers) have appointed members of the Legislature to be notaries while continuing to sit as members, and no court has ever held the act of any notary invalid because he continued to act as such while a member of a Legislature. The effect of the majority decision in this case may invalidate many instruments acknowledged before notaries, heretofore recognized as valid.

The words "office" and "public office" are very frequently used loosely without any intention to draw the line as to whether a position is an "office," a "place of trust or profit," or a "public employment," and it is due to that fact that many opinions have spoken of the position of notary public as an office. "Office" means simply a "duty," from the Latin word

officium; and as this position is called "notary public," it has been frequently, in casual writing of opinions, referred to as a public office.

But there has been no opinion of the Supreme Court of this State nor, it is believed, of any other State which has ever held the position to be a "public office" when the line was being drawn between "public offices" and "places of trust or profit" or "public employment." It is stated positively, after much research, that no court at any time, in any State or country whatever, has held the position to be a public office when there was an act of the Legislature decreeing it not to be a public office. In the *Opinion of the Judges,* 165 Mass., 599, the Court held that in that State the position of notary public was named and created by the Constitution, and, therefore the Legislature could not make it a "place of trust or profit" or a public employment merely, stating, however, that if the position was created (as it is in this State) by the Legislature, that body would be competent to make it such position as they saw fit.

In this State there have been two or three decisions which loosely refer to the position of notary public as an "office," but that was at the time when the statute referred to it as an office. It took its rank as an office from such statute, and if the General Assembly had the power to pass the act recognizing it as an office, the General Assembly of 1915 had the power to make it a "place of trust or profit." Nothing is better settled than that the act of one Legislature can be repealed or amended by a succeeding one. Neither act has any validity except as the organized expression of the public will of the time, which is subject to change or modification by any subsequent legislature.

In our own State this Court has followed (*Mial v. Ellington,* 134 N. C., 131) the decisions, universal elsewhere, that the Legislature has entire power over offices created, not by the Constitution, but by the Legislature itself (*Scown v. Scarnecki,* 164 Ill., and numerous cases there cited), and has said in words exactly applicable to the facts of this case (*Brown v. Turner,* 70 N. C., 100): "When the Legislature created and called it an office it was an office, not because the peculiar duties of the place constituted it such, but because the creative will of the lawmaking power impressed that stamp upon it; therefore, when that stamp was effaced by the repealing act it shrank to the level of an undefined duty. The authority that invested these duties with the name and dignity of a public office afterwards divested them of that name and dignity."

We have, however, had two instances in this State in which the question was sharply presented whether the position of notary public was an office or not, and in both it was held not to be, and in those cases only was the question squarely presented.

In 1867 it became an important matter to draw the line between what positions in this State were offices and what were not. The Attorney-

General of the United States, on 12 June, 1867, published his "considered opinion" (as our Court styled it), in which he defined what positions were offices and what public employments were not offices. The thirteenth paragraph in his opinion, after reciting what were "offices," says, as to those "*not* offices": "13. Persons who exercise mere agencies or employments under State authority are not disqualified, such as commissioners to lay out roads, commissioners of public works, visitors of State institutions, directors of State banks or other State institutions, *notaries public, commissioners to take acknowledgment of deeds, and lawyers.*" That opinion of the Attorney-General of the United States is quoted in full by our Supreme Court and adopted, *Worthy v. Barrett,* 63 N. C., at p. 203.

This Court subsequently and continuously down to this time has recognized its correctness, for this Court without question has been licensing women as lawyers, certainly a far more important position, and the statute requires that all lawyers must take an oath of office and an oath of allegiance both to the State and Federal Governments.

The only other case in which the point has been exactly presented was *Lawrence v. Hodges,* 92 N. C., 681. The Constitution, Art. XIV, sec. 7, provides: "No person who shall hold any office or place of trust or profit under the United States, or this State, or any other State, . . . shall hold or exercise any other office or place of trust or profit under the authority of this State." Revisal, 2349, provides: "The clerks of the Superior Court may act as notaries public in their several counties by virtue of their office as clerks, and may certify their notarial acts under the seals of their respective courts." It cannot be contested that clerks of the courts are public officers created by the Constitution. If, therefore, the position of notary public was an "office" also, the same person could not hold both positions. The act of Congress required certain mortgages on vessels to be acknowledged before a notary public, and in *Lawrence v. Hodges* the question was presented whether the clerks were valid notaries public, and it was held in 92 N. C., at p. 681, that they were. It thus conclusively appears that in both the cases in which the point was presented the position of notary public was held not to be an office.

McCullers v. Comrs., 158 N. C., 80, holding that the Governor and others can discharge certain functions *ex officio,* in no wise conflicts with *Lawrence v. Hodges.* If it did, all that would be necessary would be to provide that any woman who held the position of school trustee, to which she is eligible, can *ex officio* discharge the duties of a notary public. The position of "lawyer" has been often styled an "office," but women were admitted to the bar in this State because it was found that to hold that position an office would disqualify a large part of the Legislature and many other officeholders, State and Federal. While the statute incident-

ally refers to notaries public and lawyers as officers, there has been no express decision that a notary public is an office, till now.

But it has been argued by some that the position of notary public was an office at common law. If it had been, the common law is simply the English law, the largest part of which was the decisions of the English judges based upon their customs or the construction of their statutes, and of course subject to be changed at will by the Legislature of North Carolina in all matters that concern our self-governing people. In fact, however, a letter from Sir John Simon, at present Attorney-General of England, written in January of this year, says: "No act of Parliament has ever disqualified women from holding the position of notary public in this country, and it is very certain that none such could be passed." Even if it had been otherwise, it would not have disqualified the General Assembly of North Carolina from defining it to be a mere place of trust or profit, and authorizing women to hold it.

In *U. S. v. Bixby*, 10 Bizzell, 520, it was held by *Gresham, J.*, that "at common law a minor is eligible to the position of notary public." In Virginia, which naturally more nearly follows the English law than any other State in the Union, its Attorney-General says: "In this State any man or woman over 18 years of age can be a notary public."

But aside from any statute which (like our act of 1915) expressly makes the position "a place of trust or profit," or our previous statute, which, without expressly making it an office, merely required an oath of office (as is also required of lawyers, public administrators, and others who have been held to be not officers), the position in itself inherently is not an "office." The duties of a notary public are prescribed (Rev., 2350) and are purely those of certificate and analogous to those of a commissioner to take affidavit, and have in them no element of an office.

The decisions have all held that to be a "public office" as distinguished from a "place of trust or profit" or a "public employment" the officer must possess and exercise some of the sovereign powers of the State, either executive, legislative, or judicial. *S. v. Smith*, 145 N. C., 477, citing Mechem on Pub. Officers, sec. 1. A notary public cannot legislate. A notary cannot execute the law, and has no judicial functions. The duties of the position are simply to take down and certify evidence. For the purpose of certification, the notary has a seal, just as formerly any grantor in a deed had, to authenticate his act by his seal. This did not make every grantor a public officer. It is true that in certain rare cases a notary public has the power of contempt. So by statute has every referee in North Carolina (Rev., 492), but a referee certainly is not therefore an officer.

The entire experience and recognition of the rest of the world is against the position being *ex vi termini* a public office. In Massachusetts and in Ohio and one or two other States the position has been made

an office by the Constitution or a statute. After the passage of this act of our General Assembly an official inquiry was instituted as to the status of notary public in the other States. The replies from their judicial departments show that out of the fifty-three jurisdictions in the United States (*i. e.*, forty-eight States, the District of Columbia, and the territories of Alaska, Porto Rico, Hawaii, and the Philippines) women are competent to be notaries public in all except ten, and in those ten they were held incompetent either because, as in Massachusetts, the Constitution had made the position an office or a statute had made it an office, or, as in a few of them, "it had not been the custom to admit women to hold the place, and there was no statute as yet authorizing them to fill the position." In no case was there found, or reported, a decision holding women incompetent to fill the place when there was a statute authorizing them to do so, or providing that the position was not an office. Outside of these ten States (of our fifty-three jurisdictions) there is no country which disqualifies a woman to hold the position of notary public. There are semicivilized and barbarous countries in which they are allowed to hold no position whatever, and in those countries there is probably no such position.

There have been many cases in this Court, of course, holding acts of the Legislature unconstitutional. But no one has ever found express authority in the Constitution to do so, and it is claimed to exist by construction and inference of the courts in their own favor. This Court has, almost in every instance, therefore, wisely taken the pains to say that it will not exercise this assertion of supreme power in setting aside the action of the other departments of the Government unless such action was clearly unconstitutional, and has repeatedly quoted on this point *Ogden v. Sanders* (U. S. Supreme Court), 12 Wheaton, at p. 270, in which it was held that the highest Court in the Union would not even hold a State act unconstitutional as in violation of the Federal Constitution unless it were so "beyond all reasonable doubt." This is the considerate language of that high Court: "It is but a decent respect due to the wisdom, integrity, and patriotism of the legislative body, by which any law is passed, to presume in favor of its validity until its violation of the Constitution is proved *beyond all reasonable doubt.*"

Ought not this Court to follow what we have so often quoted and approved, and out of a "decent respect to the wisdom, the integrity, and the patriotism of the legislative body" hold that the violation of the Constitution by that body in this case "is not proved beyond all reasonable doubt"?

This position had its origin in the Roman civil law. Its duties were, and still are, like those of a stenographer, with power only to certify the evidence taken down or acknowledgments made of instruments. The notary public has no legislative, executive, or judicial authority. He

cannot even probate a deed, but merely certifies its acknowledgment (*White v. Connelly,* 105 N. C., 65), though it is held that even a deputy clerk, who can probate it, is not an officer.

The Attorney-General of the State, in this very case, appearing in open Court, admitted the validity of this statute. The Attorney-General of the United States has said in an official opinion that "commissioners of affidavits, *notaries public,* and lawyers" are not public officers, and this Court in an unanimous opinion affirmed that ruling and have acted upon it ever since as to the other two positions. Why overrule it now as to notaries public alone? The Attorney-General of Great Britain says that the law does not disqualify women from being notaries public. Why should we disqualify them? In all the other States and territories of the Union, except ten, women are admitted to be notaries public. In our own State the Revisal, 3349, permits the clerk of the court to be a notary public, which he could not be if it was an office, and this Court held, as above stated, that he was a valid notary public where the validity of a mortgage under a United States statute required the instrument to be acknowledged before a notary public. In the ten States not permitting women to be notaries public there is no statute permitting them to be.

If any opinion I have ever written, when the statute as to notaries was different, could be fairly construed as opposed to what is herein said by me, under the present statute, it would not be an estoppel to hold correctly in this case. Besides, I have no pride of opinion that compels me to prefer former opinions, if erroneous, to doing justice now. I have never deemed myself infallible, but hold that all judges should be glad of opportunity to correct their mistakes. We should grow wiser with the years; otherwise, experience is of no value. The infallibility of judges is not an American doctrine, nor indeed is it held anywhere.

Under changing conditions, due largely to the introduction of machinery, women are forced to seek new and wider employment. The Legislature, recognizing this, and learning that in some quarters there was opposition to their receiving fees in the purely clerical work of a notary public, owing to some passing references to the position as an "office" in two or three decisions, passed an act making the position merely "a place of trust or profit," and not an office, and specifically authorizing the Governor to appoint women. This was purely a political question, and the Legislature was acting with an intelligent understanding of changed economic conditions and in a humane desire to do justice to a deserving class, and with full recognition of their obligation to observe the Constitution. The Governor was "authorized," not "required," to appoint women. He is one of the foremost lawyers of the State, with the intelligence, firmness, and patriotism to know and maintain the limitations of the Constitution. He appointed the plaintiff to

this position. The judge of the lower court, sworn also to obey the Constitution, and a learned lawyer, held that it was no violation of the Constitution for the Legislature to so enact. Our Attorney-General, who brought this action, stated on the argument, after fuller investigation, and also in writing his opinion that the action of the Legislature is constitutional.

Ought this Court, by three votes to two, hold that this action of the executive department and of the Legislature and by the other judicial officers who have passed upon this matter has been beyond question a violation of the Constitution, and that, too, without specifying the provision of the Constitution that has been so dangerously and alarmingly violated when the Legislature has permitted women working for a living to earn a few needed fees by authorizing them when taking down and certifying evidence merely to authenticate their certificates by adding the impression of a seal? The statute provides that such impression of a seal does not make the position an office.

It has been urged, however, that fees are paid for impressing the seal! "Ay! there's the rub." Women are not voters, and there are those who think that fees should be reserved exclusively for voters, in recognition of their services. But these fees are not paid by the State or county, but by individuals, and notaries receive no salaries.

It was held in *Brown v. Turner,* 70 N. C., 100, that the position of Public Printer, worth many thousands of dollars, which the previous statute had made an "office," was reduced to the grade of a "place" because the Legislature said so, though the effect was that a Republican Court thus admitted the validity of the act of a Democratic Legislature in filling the "place" with a Democrat when the Republican Governor, holding it to be an "office," had appointed one of his own party.

In *S. v. Smith,* 145 N. C., 476, this Court held that a public administrator who has a term of eight years, gives bond, and takes an oath of office (Rev., 19) is a mere "place" and not an "office," *Brown, J.,* quoting from *Chief Justice Marshall,* saying that "Although an office is a public employment, it does not follow that every public employment is an office." *S. v. Smith* was cited with approval by *Allen, J.,* in *Boynton v. Heartt,* 158 N. C., 490.

The Constitution of this State does not prohibit the Legislature from admitting women to any office. The prohibition is just the opposite, and merely forbids any one who is a voter from being disqualified to hold office. *S. v. Bateman,* 162 N. C., 591.

Even if every position created by the Legislature, however small, could be held to be an office, notwithstanding legislative enactment to the contrary, the Constitution of this State has never made the requirements for voting and for holding office the same. Prior to 1868 the Constitution imposed the ownership of property as a prerequisite for certain

offices. The Constitution of 1868, discarding all that, imposed the sole limitation upon the Legislature that no voter should be disqualified to hold office, with the exceptions therein named; which exceptions do not name women.

Singularly enough, the majority opinion in this case quotes from a judge who was a woman (Portia), when she held that Shylock's demand of a "pound of flesh" must be granted, because else the ruling would be "recorded as a precedent," etc. It will be recalled, however, that she almost immediately reversed that ruling, to which she had been overpersuaded, and rendered a just judgment on the merits. That case has been famous for ages as showing the competency of a woman for judicial position, in that she administered justice and was superior to the superstition that erroneous precedents are more sacred than justice. A woman herself, Judge Portia certainly did not intend that her decision should be quoted as authority that a woman could not be a notary.

The General Assembly has all the powers of legislation that the people themselves have, unless restrained by some provision of the Constitution. Cannot the Legislature of a sovereign State provide that the function of authenticating a certificate or acknowledgment or protest by making the impression of a seal on paper shall be a "place" and not an "office"? And that women may receive the fees for such work, if appointed?

The feudal and medieval theory as to women—"half angel and half idiot"—meant in practice that those above the necessity of work might be on public occasions spoken of as if "half angels," but that all classes of them, and all the time, were treated as at least "half idiots" and without legal rights. If married, they were submerged in the existence, and under the power, of their husbands, who had the right even to chastise them at will. This last right persisted in North Carolina down to 1874, when *Settle, J.*, in *S. v. Oliver*, 70 N. C., 61, said the courts had "advanced from that barbarism"—thus overruling the then recent cases of *S. v. Black*, 60 N. C., 262; *S. v. Rhodes*, 61 N. C., 453, and others. In all progressive communities feudal ideas have passed, or are passing, and women are held to be human beings, entitled to equal rights with men.

There is but one question in this case, "Can this defendant discharge the duties of a notary when so authorized by an act of the Legislature and commissioned by the Governor? Or is she barred because she is a woman?"

Under the Constitution of the United States no one is debarred from holding any office, from President down, because of sex. What provision of the State Constitution will be shattered, and what detriment will the public welfare receive, if by legislative and executive authority a woman shall authenticate a certificate, made by herself, by impressing the seal upon a piece of paper?

If the plaintiff were a man he would not be debarred from holding this appointment unless he were an idiot, a lunatic, or a convict. The Legislature, voicing the sentiment of the people of the State, have enacted that it is neither a crime nor a defect in this appointee to discharge the clerical duties of a notary public because she is a woman. Shall the Court hold that it is?

BROWN, J., dissenting: I concur in the opinion of the Court except as to the conclusion that the position of notary public is a public office. Therefore, I hold that a woman may well fill such place.

While I think the weight of authority is that it is a public office, there is some decided conflict of opinion upon the subject, and as I think it is a position a woman may well fill, I do not agree to the judgment rendered.

STATE v. CHARLES E. TRULL.

(Filed 5 May, 1915.)

1. Homicide—Circumstantial Evidence—Motive—Robbery—Identification of Money.

Where circumstantial evidence is relied on by the State for conviction of a homicide, tending to show robbery of money as a motive for the crime, it is not required that the State prove that the identical amount or the identical money afterwards found on the prisoner was taken by him from the deceased, for evidence to establish motive for murder is not of the character required upon a charge of robbery alone.

2. Homicide—Circumstantial Evidence—Chain of Evidence—Instructions.

Where there are several phases of circumstantial evidence on the trial for a homicide not so related or interwoven that the jury may not find their verdict on one or several or all of them, it is not error for the judge to refuse to give a requested instruction that each circumstance testified to depended upon the truth of the preceding one, and "the chain is no stronger than its weakest link, and when broken becomes a rope of sand."

3. Homicide—Circumstantial Evidence—Degree of Proof—Instructions.

Upon a trial for homicide wherein the State relies upon circumstantial evidence, it is not error for the trial judge to disregard the language of a special prayer for instruction offered by the defendant, "that the circumstances so relied on must be so clear and convincing as to point unerringly to the guilt of the defendant, and must exclude every possibility of his innocence," where, using his own language, the judge has substantially complied therewith.

4. Jurors—Homicide—Segregation—Appeal and Error—Court's Discretion.

It is not a statutory requirement that jurors should be kept together during the trial of a case, but a practice of the court to prevent their being tampered with, which should be given a reasonable construction; and where it appears on appeal from the refusal of the trial judge to

grant a new trial on that ground, and from the findings of the judge, that a jury in a homicide case had been permitted during the trial to sleep in adjoining rooms at a hotel, segregated from the other guests of the hotel, but they communicated with no one except to ask the bell-boy for ice water; and the defendant was in no wise prejudiced, it is held that the action of the judge was within his reasonable discretion, and not reviewable.

5. Homicide—Mental Incapacity of Defendant—Drugs—Appeal and Error—Findings.

The refusal of a new trial by the judge on the ground that the defendant, charged with homicide, was under the influence of an opiate at the trial, and unable, for mental incapacity, to properly conduct his defense, is not held erroneous on this appeal, it appearing that as soon as the judge observed that the defendant did not seem to be right he adjourned court, had the defendant examined by the county physician, who reported the defendant in good condition the next morning, when the trial was proceeded with; and if any mental incapacity had theretofore existed, it had not been called to the attention of the court, and that the defendant throughout the trial was in full possession of his faculties.

6. New Trial—Court's Discretion—Appeal and Error—Findings.

The findings of the trial judge upon a motion before him for a new trial upon newly discovered evidence, and his refusal of the motion, are not reviewable on appeal.

7. Appeal and Error—Docketing Appeals—Agreements—Procedure.

The statute and rules of the Court requiring docketing appeals in the Supreme Court before the call of the districts to which they belong, etc., under penalty of dismissal (Rules 5 and 7, Revisal, sec. 591), may not be varied, either in criminal or civil cases, under agreement with the solicitor or opposing counsel to extend time to the appellant later than that allowed; and when these requirements for any reason cannot be complied with, the appellant must docket the record proper in the Supreme Court, and apply to the Court for a *certiorari*.

THE prisoner was convicted before *Shaw, J.*, at June Term, 1914, of MECKLENBURG, of murder, in the first degree, of Sidney Swain, who was killed by a blow on the head with an iron pipe, after midnight on Saturday, 16 April, 1914, while going home from his store.

It was in evidence that the deceased, before leaving his store about 12:20 at night, took from the money drawer all the cash therein, about $225 having been taken in that day; besides there was in the drawer the cash taken in for three or four days previously, and that when his body was found there was only $3 in his hip pocket; that on Tuesday before the homicide the prisoner left his boarding-house because he could not pay his board bill, and was in the habit of borrowing small sums of money and pawning his effects; that on that Saturday afternoon he went to his boarding-house, and, being asked to pay his bill, said that he would pay on Monday morning; that at 10:30 that night he went to a barber shop and asked to be shaved on credit; that at 3:30 that afternoon he borrowed 75 cents to buy a pair of shoes; that about 12:30 that night the

prisoner asked the witness Barton to exchange suits with him, and Barton let him have his coat, and about 2 o'clock that night he was awakened by the prisoner, who took off his pants and put on another pair, and that at the prisoner's invitation the witness went with him to several places "to have a big time"; that on objection by Barton that he had no money, the prisoner then replied that he had plenty of money and would pay all expenses; they visited several places, and the prisoner spent considerable money, besides giving the witness $10. On his return the prisoner seemed much excited and nervous, and during the night repeatedly insisted on the witness leaving town with him. The witness and the prisoner were arrested early the next morning, and just before the arrest the prisoner said to the witness that if anything got out and the witness said anything about it, he (the prisoner) would shoot him.

It appears from the testimony of the officers that when the witness Barton and the prisoner were arrested $10.55 was taken from Barton and $407.50 from the prisoner; that the prisoner said when arrested that he did not know how much money he had, and the prisoner's pants, which Barton testified he had taken off and put in a drawer, on his return, had fresh blood on them; the shoes taken from the prisoner were the same which he had bought with the 75 cents borrowed from Barton and fitted the tracks found near the body, the tracks showing the five bars which were on the shoes; one of the shoes had blood spots on it. There were other circumstances in evidence, several witnesses testifying that they saw the prisoner about 12 o'clock that night, or shortly thereafter, in the vicinity of the place where the deceased was murdered, some of them noticing the change in his clothing, and that between 11 and 12 o'clock the prisoner had tried to borrow a pistol. Barton further testified that when they were arrested and taken to the police station the prisoner beckoned him into the toilet-room and suggested how he should obtain testimony as to how the prisoner had obtained money. The driver of the patrol wagon testified that the prisoner beckoned to Barton and they went together into the toilet-room. The chief of police testified that Barton in the prisoner's presence gave substantially the same recital of the circumstances which he testified to on the stand. The prisoner in his own behalf gave his account of his movements that evening, which it is not necessary to recite, and accounted for his money by saying that he had been saving it up for some time to go to Hot Springs, Arkansas, for treatment of a disease, and that he had put his money around in different places from time to time; that he hid some money in a mattress at his boarding-house; that he pulled a plank off a store and had concealed some money there, and that he had hidden money between Riles' store and the alley, and that that evening he had gone around and collected up the money thus hidden. It is unnecessary to state the evidence more in detail.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

D. B. Paul and Newell & Newell for prisoner.

CLARK, C. J. There are no exceptions to the evidence. Exceptions 1, 2, and 3 are to the refusal of the court to give three special instructions requested as to circumstantial evidence.

The first request was to charge that "Where the State relies wholly upon circumstantial evidence for conviction it is incumbent upon the State to establish each circumstance beyond a reasonable doubt. In this case the State alleges that the deceased was murdered by the defendant, the motive being robbery; and it alleges that the money taken from the defendant's person and also off the witness Barton was the identical money that was taken from the deceased at the time of his murder. Therefore, the State must satisfy you beyond a reasonable doubt, first, that the deceased had at least $417.50 on his person at the time of the murder, and that the money taken from the defendant and also from the witness Barton is the identical money that the deceased had. If the State has not so satisfied you, you will return a verdict of not guilty."

The court could not give this charge as asked. This is not an indictment for robbery, and if it were, it would not be necessary to prove the identical amount charged. The court in the charge correctly instructed as to circumstantial evidence all that the prisoner could have asked, as follows: "Each essential and material fact relied upon by the State must be established beyond a reasonable doubt." The court also charged as to circumstantial evidence: "When such evidence is relied upon to convict, it should be clear, convincing, and conclusive in all its combinations, and should exclude all reasonable doubt as to guilt." And further: "In passing upon such evidence it is the duty of the jury to consider all the circumstances and determine whether they have been established beyond a reasonable doubt." This was a sufficient compliance with the prayer. *S. v. Brackville,* 106 N. C., 701.

The second exception is to the refusal of the court to charge that "Where circumstantial evidence connected the prisoner with the crime, each circumstance depends upon the truth of the preceding one, and the chain is no stronger than its weakest link, and, when once broken, becomes a rope of sand." The prisoner further asked the court to charge, as an application of the principle, that unless the State satisfied the jury that the prisoner did not have the money hid out, as he said, and that the money which he had when arrested was the identical money which the deceased had on his person when he was murdered, and that the prisoner and no one else murdered him and took his money, the jury should return a verdict of not guilty. But this was not a case calling for the application

of the principle stated. In *S. v. Neville,* 157 N. C., 596, *Mr. Justice Walker* said: "There was no chain of circumstances in this case which required the court to tell the jury that each circumstance which constituted a link must be established to their full satisfaction. A chain is no stronger than its weakest link, it is true; but there is no series of facts in this case necessary to be considered by the jury in order to convict the defendant."

In *S. v. Fleming,* 130 N. C., 689, the refusal of the court to charge, "Every link in the chain of evidence must be proved beyond a reasonable doubt," was sustained when in lieu thereof the court instructed the jury, as in this case, that the State must establish every circumstantial fact upon which it relies, beyond a reasonable doubt. In *S. v. Shines,* 125 N. C., 730, the Court said: "There are cases of circumstantial evidence in which each circumstance depends upon the truth of the preceding one, in which case the evidence may be likened to a chain, which is no stronger than its weakest link. But usually that simile is inapplicable. Ordinarily, the circumstances accumulate, each one by itself being of no great strength, but like the bundle of twigs in the fable, or the several strands twisted into a rope or cable, becoming, when united, of great strength," citing several cases. Even when a charge giving the simile of a chain may be properly used, it refers only to the necessary links in the chain of evidence. *S. v. Carson,* 115 N. C., 743; *S. v. Crane,* 110 N. C., 530.

The third exception is to the refusal of the court to charge in the identical words of the prayer: "Where circumstantial evidence is wholly relied upon by the State for conviction, as in this case, the circumstances so relied upon must be so clear and convincing as to point unerringly to the guilt of the defendant, and must exclude every possibility of his innocence." The court in its charge substantially complied with this request, saying: "Do these circumstances exclude from your conclusion everything except that of guilt?" And, "Such facts (essential or material facts) so established must not only be consistent with the defendant's guilt, but those facts must be inconsistent with the defendant's innocence and exclude every reasonable hypothesis of his innocence." The whole charge is carefully expressed and fully conveys the idea set out in the prisoner's prayer, often repeated.

Exception 4 was for the refusal of the court to grant a new trial on account of alleged improper conduct of the jurors. The matters alleged were that the jurors were permitted to sleep in separate rooms and to read newspapers containing accounts of the trial, and that the hotel bellboy was admitted to the rooms while the jurors were occupying them. The court found as facts that "The jurors were properly kept together and in the custody of an officer during the day, but that at night they occupied five adjoining rooms on the same floor. The jurors were allowed

to occupy five rooms on account of oppressive heat. No persons had access to such rooms except the maid at the hotel and the bell-boy, and the jurors communicated with no one except to order water from the bell-boy. No juror read any newspaper during the trial." The court further found that "while the conduct of the officer in keeping the jury in five different rooms was improper, yet no harm came to the prisoner on this account."

The requirement that the jury should be held together is not statutory, but the practice of the courts in order to prevent the jury being tampered with. It must receive a reasonable construction. There must be necessarily some separation, for the jurors do not all sleep in one bed, and in the dining-room, where there are small tables, they cannot sit at the same table; but it is sufficient if they are segregated from mingling with the crowd, and there are other occasions which necessarily require the temporary retirement of a juror from the body of his fellows. On this occasion, owing to the heat and possibly from the difficulty of procuring a sufficiently large room, the jurors occupied five adjoining rooms, and from the testimony those five rooms were on the same floor and segregated from the rest of the rooms on that floor by a bathroom and toilet, "setting off this lot of rooms from any of the other rooms in the building," and all five rooms opened on the same hall. The judge finds as a fact that the jurors did nothing improper during the trial and communicated with no one except to order ice water from the bell-boy. There was no impropriety in this, any more than in speaking to the waiter at the table to bring water or dishes.

Even if the judge were correct in finding that it was improper for the jurors, under the circumstances, to occupy five adjoining rooms opening upon the same hall, still he finds that there was no communication with outsiders (except with the bell-boy, as stated), and that no harm accrued to the prisoner.

It has been uniformly held that when the circumstances are such as merely to put suspicion on a verdict (which was not the case here) by showing, not that there was any undue influence, but merely opportunity, the granting of a new trial rests in the discretion of the trial judge. This was fully discussed and decided in *S. v. Tilghman*, 33 N. C., 553, and very numerous cases in the citations thereto in the Anno. Ed. Among many in point are *S. v. Brittain*, 89 N. C., 504, and *S. v. Crane*, 110 N. C., 537, and cases there cited, and *S. v. Morris*, 84 N. C., 765, and citations in the Anno. Ed. At this term the Court has reiterated, in *Lewis v. Fountain*, 168 N. C., 277, and in *Cook v. Highland Hospital*, 168 N. C., 250, that where the circumstances are such as merely to put suspicion on the verdict because there was opportunity and a chance for misconduct, this is not sufficient to set aside the verdict, unless there was

in fact misconduct. When there is merely matter of suspicion it is purely in the discretion of the presiding judge, citing *Moore v. Edmiston,* 70 N. C., 481; *S. v. Brittain, supra; Baker v. Brown,* 151 N. C., 17, and *S. v. Tilghman, supra.* In *Baker v. Brown* this proposition is fully discussed and sustained by *Walker, J.* In *S. v. Harper,* 101 N. C., 761, where eleven of the jurors went to dinner under charge of an officer, and the other remained in his room under the charge of a sworn deputy, but the court found there was no effect on the verdict caused thereby, this Court sustained the judge below in refusing to set aside the verdict. That case was a conviction of a felony, though not capital.

Under the ancient common law, after the jury were charged they were kept together, both in civil and criminal cases, "as if they were prisoners, until they are discharged." *Bannister, J.,* in *Bishop of N. v. the Earl of Kent,* 14 Henry VII., ch. 29, quoted by Thompson and Merriam on Juries, sec. 310. In those times trials of causes lasted but a single day, and the power of the court to adjourn from day to day to give jurors opportunity for rest and refreshment was doubted or denied. Indeed, the jurors were denied "meat and drink" until they had agreed. In modern times there has been a great amelioration, owing to the greater intelligence of the jurors, the greater respect for their intelligence, and the changed conditions of modern times. Indeed, in civil cases, the separation of a jury after being charged, though without leave of the court, before they have agreed upon their verdict, is not now, as a mere matter of law, ground for a new trial. Thompson and Merriam on Juries, sec. 315. In some of the States this has been extended to prosecutions for felony and even in capital cases. Thompson and Merriam, sec. 318. In this State the jury in felony cases, after the charge, are required to be kept together, though there are many instances in which the jurors have been and must be permitted to separate during the progress even of a capital trial, under the charge of sworn officers. One or more of the jury in a capital case have been permitted, in some States, to visit their homes under the charge of a sworn officer. See Thompson and Merriam, sec. 321, and cases there cited. We would not be understood as approving or encouraging such practice. We merely hold, in this case, that on the facts found there was no legal separation, and that even if there was, the judge having found that there was no communication with outsiders and that no harm accrued to the prisoner, he properly refused to grant a new trial. It will be noted that there is a distinction between the discharge of a jury before verdict and a temporary separation, for purposes of necessity, or a *quasi* separation as in this case, where the jury is really still kept separate from outsiders and the judge finds that no prejudice accrued to the prisoner.

The prisoner also excepted to the refusal of the court to grant a new trial on the allegation that the prisoner was under the influence of an opiate during a part of the trial. The court finds as facts that while the court was charging the jury the defendant was asleep a part of the time, but that the court did not know of the fact, and that the counsel of the prisoner did and failed to call the attention of the court thereto; that late one afternoon during the trial the court discovered that the prisoner did not seem to be right, and at once adjourned court for the afternoon and had the prisoner examined by the county physician, who the next morning reported him in good condition; that then the trial proceeded, and the judge, with the aid of the county physician, observed the condition of the defendant thereafter during the trial, and that he was in full possession of all his faculties and entirely capable of conducting his defense; that if he was under the influence of an opiate at any time it was smuggled to him without the knowledge of the officers and was taken by him voluntarily. Though the court finds that the prisoner appeared drowsy at times, it also found that he was throughout the trial in full possession of all his faculties and capable of conducting his defense. The court could not have taken more precautions than the careful judge appears to have taken in behalf of the prisoner in this case.

The refusal of the court to grant a new trial for newly discovered testimony rested in his discretion, and is not reviewable. *S. v. Jimmerson,* 118 N. C., 1173; *S. v. DeGraff,* 113 N. C., 690; *S. v. Morris,* 109 N. C., 820. The findings of fact by the court on such motion are not reviewable. *S. v. DeGraff,* 113 N. C., 690; *S. v. Morgan,* 120 N. C., 563; *S. v. Lance,* 109 N. C., 789; *S. v. Dunn,* 95 N. C., 697.

This Court has uniformly held that "a petition to rehear, or to grant a new trial, for newly discovered testimony cannot be entertained in this Court in criminal actions." *S. v. Ice Co.,* 166 N. C., 404, citing numerous and uniform decisions. After careful consideration of all the assignments of error and scrutiny of the entire record, we find no error.

We note that this trial was had in June, 1914. Under the statute and rules of the Court this appeal was required to be docketed at the Fall Term of this Court before the call of the docket of the district to which it belongs, under penalty of dismissal. Rules 5 and 7, 140 N. C., 540, 544; Revisal, 591; *Pittman v. Kimberly,* 92 N. C., 562, and numerous cases thereto cited in the Anno. Ed., and *Burrell v. Hughes,* 120 N. C., 277, citing numerous cases and with numerous annotations in the Anno. Ed. It appears in the record that the solicitor agreed with the prisoner's counsel that the case might be postponed and docketed at this term. This was an irregularity, and was beyond his authority. The statute must be complied with and the cause docketed at the next term here after the trial below. If in any case there is any reason why this cannot be done, the

appellant must docket the record proper and apply for a *certiorari,* which this Court may allow, unless it dismisses the appeal, and may then set the case for trial at a later day at that term or continue it, as it finds proper. It is not permitted for counsel in a civil case, nor to the solicitor in a State case, to assume the functions of this Court and allow a cause to be docketed at a later term than that to which the appeal is required to be brought by the statute and the rules of this Court.

No error.

STATE v. FORREST C. BERRY.

(Filed 24 May, 1915.)

1. Criminal Law—Indictment—Sheriff's Return of Civil Process.

The willful failure of a sheriff to return process directed to him from the Superior Court is made a misdemeanor by the provision of Revisal, sec. 3604, and applies to civil as well as criminal process, its placing under the title of "crimes and punishments" being irrelevant in construing the language employed; and this interpretation is also applicable under Revisal, secs. 3576, 3592. *S. v. R. R.*, 145 N. C., 498, cited and distinguished.

2. Same—Corrupt Intent.

It is unnecessary for an indictment against a sheriff for willful failure to return legal process directed to him to allege a corrupt intent.

APPEAL by State from *Cline, J.*, at January Term, 1914, of HAYWOOD.

Indictment against defendant sheriff of Burke County for failure to return certain executions, heard upon motion to quash. The court quashed the bill, and the State appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Avery & Ervin for defendant.

BROWN, J. The defendant, as sheriff, was prosecuted on an indictment alleging that he "willfully and unlawfully did fail to return a certain process to him directed from the Superior Court of Haywood County, towit, one execution issued on a judgment in favor of American Lumber Company as plaintiff and Abernethy & Lyerly as defendants," etc.

A motion by defendant was made to quash the indictment, on the ground that it is not an indictable offense under the statutes of North Carolina for a sheriff to fail to return the process issued to him in a civil action.

From a judgment sustaining the motion to quash, the State appealed.

No point is made as to any technical defect in the indictment. The only ground of the motion to quash was that it was not an indictable

offense for a sheriff to fail to return a process issued to him in a civil action.

It is said that the indictment is founded on section 3604 of the Revisal, which reads as follows: "If any sheriff, constable, or other officer, etc., . . . refuse or neglect to return any precept, notice, or process to him tendered or delivered, which it is his duty to execute, or make a false return thereon, he shall forfeit and pay to any one who will sue for the same, $100, and shall, moreover, be guilty of a misdemeanor."

An analysis of this section fails to disclose any reason why it does not cover the offense charged in the indictment in this case. It is said that this statute, which is identical with section 1112 of The Code, has been held to be confined to criminal processes only. It is claimed that this was decided by this Court in *Hall v. Warren*, 100 N. C., 264. It is not plain by any means that the Court so held. It is said in that case: "The present action is brought under that section (1112 of The Code), which belongs to the chapter entitled 'Crimes and Punishments.'"

The only language in the opinion which we can find from which it can be inferred that this statute is applicable only to criminal process is that which we have quoted from the opinion. The fact that the statute is embraced in the chapter on "Crimes and Punishments" is no warrant whatever for the position that its language applies only to a failure to return criminal process. As the statute is a criminal statute and creates an offense, it is very properly placed in the chapter on "Crimes and Punishments," and the fact that it is there does not alter its character or limit or qualify the plain meaning of its language.

This seems to have been a mere *obiter* and not at all necessary to a decision of that case. This inadvertence is referred to in *Mfg. Co. v. Buxton*, 105 N. C., 75, in these words: "Section 1112 is found in the chapter on 'Crimes and Punishments,' and it is held in *Harrell v. Warren*, 100 N. C., 259, to apply only when criminal process is delivered to an officer." No reason is given in either case for a construction so at variance with the plain language of the statute itself.

Therefore, we are unwilling to perpetuate the error any longer. We conclude that this section of Revisal, 3604, is amply sufficient to support the indictment. If this were not true, then there are two other sections of the Revisal which are amply sufficient to uphold the bill.

Section 3576 provides that "If any State or county officer shall fail, neglect, or refuse to make, file, or publish any report, statement, or other paper, . . . or to discharge any duty devolving upon him by virtue of his office as he is by law required to do, he shall be guilty of a misdemeanor."

Section 3592 in part declares: "If any . . . sheriff . . . shall willfully omit, neglect, or refuse to discharge any of the duties of his

office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a misdemeanor."

It is not necessary that the bill should allege or that the State should prove a corrupt intent in order to convict an officer of willful omission, neglect, or refusal to discharge his duty. *S. v. Hatch,* 116 N. C., 1003.

The principle laid down in *S. v. Snuggs,* 85 N. C., 542, and in *S. v. R. R.,* 145 N. C., 498, has no application here. In those cases it is held that when an offense is created by statute, and did not exist at common law, and the penalty for its violation is prescribed by the same statute, the particular remedy thus prescribed must alone be pursued, for the mention of the particular remedy makes the latter exclusive.

The difference between the statutes under consideration in those cases and section 3604 of the Revisal is that the last named statute prescribed not only a penalty, but likewise makes the violation of it a misdemeanor. In the two cases cited the statutes under consideration prescribed only a penalty, and did not make the violation of them a misdemeanor.

Reversed.

STATE v. W. M. TATE AND HAY COPE.

(Filed 24 May, 1915.)

1. Witnesses — Mental Capacity — Findings of Judge—Appeal and Error—Weight of Evidence—Questions for Jury.

A finding by the trial judge upon the examination of a witness that he is qualified as to mental capacity to testify is not reviewable on appeal, the weight of the testimony being for the jury.

2. Trials—Evidence—Nonsuit.

The refusal to nonsuit upon the evidence in this case was proper. *S. v. Poteet,* 30 N. C., 23; *S. v. Eliason,* 91 N. C., 564.

3. Appeal and Error—Jurisdiction—Oral Motions—Supreme Court—Appellant's Brief.

Oral motion to dismiss for want of jurisdiction in the inferior court may be made for the first time in the Supreme Court on appeal; but it is suggested that it would be but just to the opposing party for appellant to take this position in his brief.

4. Constitutional Law—Trial by Jury—Appeal—Superior Court.

The constitutional guarantee of a trial by jury is not violated in a police court for the trial of misdemeanors, where there can be no sentence imposed of imprisonment in the State's Prison or of death, and this right is preserved by right of appeal to the Superior Court.

APPEAL by defendant from *Cline, J.,* at January Term, 1915, of HAYWOOD.

Attorney-General for the State.

M. Silver for defendants.

CLARK, C. J. The defendants were indicted for fornication and adultery under Revisal, 3350, in the police court of Waynesville, and adjudged guilty. On appeal to the Superior Court, they were tried before a jury, who found them guilty.

The first exception is because, the defendants having objected to permitting one Flora Franklin to testify because of mental incapacity, the court, after questioning the witness, who was also questioned by the counsel for the defendants and by the solicitor, found as a fact that she was competent to testify. In *S. v. Perry,* 44 N. C., 330, where the same objection was made, the Court held that the trial judge was the exclusive judge as to the competency of a witness in such case to testify, the weight of the testimony being for the jury. The finding by a trial judge that an infant is competent to testify was held conclusive. *S. v. Stewart,* 156 N. C., 636; *S. v. Edwards,* 79 N. C., 648; *S. v. Manuel,* 64 N. C., 601; 40 Cyc., 2240.

Exception 2 was for the refusal of a nonsuit. We need not recite the evidence, but it was amply sufficient to be submitted to a jury. *S. v. Poteet,* 30 N. C., 23; *S. v. Eliason,* 91 N. C., 564. It is rarely that in cases of this kind there can be direct evidence, but the attendant circumstances were sufficient to justify a jury in finding a verdict of guilty in this case, and were properly submitted to a jury.

The exception was submitted orally in this Court, not having been taken below, nor set out in the record nor in brief of counsel, that the police court did not have jurisdiction. It is true that such objection can be taken for the first time in this Court (Rule 27, 164 N. C., 548), but it would be just to the other side to at least present the matter in the appellant's brief. The defendants have had a trial before a jury in the county of Haywood, and have thus preserved their constitutional rights. They were in no wise prejudiced by the fact that prior thereto they had been tried in the police court, for the trial in the Superior Court was entirely *de novo.* The constitutionality of police courts for the trial of misdemeanors, where there can be no sentence imposed of imprisonment in the State's Prison or of death, and the defendant on appeal has had a jury trial in the Superior Court, has been too often sustained to require discussion. *Walker, J.,* in *S. v. Collins,* 151 N. C., 648, citing *S. v. Lytle,* 138 N. C., 738; *S. v. Baskerville* (*Hoke, J.*), 141 N. C., 811; *per curiam* opinion in *S. v. Jones,* 145 N. C., 460; *S. v. Shine,* 149 N. C., 480. A later case is *S. v. Hyman,* 164 N. C., 411.

No error.

STATE v. ABE ALLISON.

(Filed 12 May, 1915.)

Burglary—Identification—Evidence—Questions for Jury.

Whether the evidence is sufficient to be submitted to the jury and to sustain their verdict is a question of law; and in this case it is held sufficient, though there are several circumstances, consistent with the prisoner's innocence, to identify him as the one charged with, tried for, and convicted of burglary in the first degree.

APPEAL by defendant from *Adams, J.*, at October Term, 1914, of IREDELL.

The prisoner was convicted of burglary in the first degree and sentenced to be electrocuted, and from the judgment pronounced against him appeals.

The prisoner requested his Honor to instruct the jury that the evidence was not sufficient to justify a conviction and that the jury must return a verdict of not guilty, which was refused, and the prisoner excepted, and this is the only exception presented by the appeal.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

W. D. Turner for defendant.

ALLEN, J. The evidence establishes the fact that the crime charged in the bill of indictment was committed, that is, that some one broke and entered the dwelling-house of the prosecutrix, then actually occupied as a sleeping apartment, in the nighttime, with intent to commit a felony, and the only debatable question raised by the prayer for instruction is whether there is evidence which ought to have been submitted to the jury that the prisoner is the perpetrator of the crime.

The evidence is not satisfactory, and several of the circumstances relied upon to prove guilt are consistent with innocence; but we cannot say that there was no evidence for the consideration of the jury. As was said in *S. v. Hawkins,* 155 N. C., 470, quoting from *S. v. White,* 89 N. C., 464, "It is well settled law that the court must decide what is evidence, and whether there is any evidence to be submitted to the jury pertinent to an issue submitted to them. It is as well settled that if there is evidence to be submitted, the jury must determine its weight and effect"; and again, when speaking of circumstances relied on by the State, "The court cannot, however, decide that they are true or false; that is for the jury; but it must decide that, altogether, they make some evidence to be submitted to the jury."

The prisoner is a negro man, and the evidence introduced by the State tends to prove that the crime was committed by a negro, because the

prosecutrix testified that when she was awakened by feeling the hand of some one upon her person, she threw up her hand and it fell on the head of a negro; that the prisoner lived within 260 steps of the home of the prosecutrix, and no other negro lived nearer than 2 miles; that the prosecutrix is a married woman; that her husband had been away from home for several days and she was alone, except she had with her three small children, the oldest 5 years of age; that the prisoner knew these facts; that on Saturday before the crime was committed the prisoner was at the home of the prosecutrix and spoke of the fact that her husband was away, saying that he ought not to go away and leave the prosecutrix there; that it was real dangerous and too lonesome; that he said this three or four times; that on the afternoon before the crime was committed the prisoner went to the home of the prosecutrix three times, once at 2 o'clock to get apples, again at 4 o'clock to carry the mail, and at 5 o'clock to get water from the well; that he had never gotten water from the well before, and used water from a spring near his house; that when the prosecutrix was awakened on the night the crime was committed, by finding some one in her room, she ran from the house screaming, going in the direction of the house of the prisoner, and when about halfway between the two houses she stepped in a ditch and screamed again; that the prisoner, dressed in his night clothes and barefooted, then came to her, coming from the bushes and from the south, his home being towards the north; that the prosecutrix asked him why he waited so long before coming to her, and he said he waited to load his gun; that he had no gun with him; that the wife of the prisoner then joined them, and he and she went with the prosecutrix to her home for the purpose of getting her children; that when they reached the home they looked for tracks under the window and found one, which was a barefoot track; that the defendant said, "There are tracks, and the one who made them had on shoes"; that there was also a barefoot track on a shirtwaist which had been left on the floor in the room where the prosecutrix was sleeping; that the prisoner and his wife went with the prosecutrix to the home of a neighbor; that the prisoner said to this neighbor on that night that he was glad that he was at his home, or the crime would have been laid on him; that there was a barefoot track under the window through which the person who committed the crime entered the house; that the foot of the prisoner was placed in this track and it fitted exactly; that there was a path leading from the direction of the home of the prosecutrix to the back door of the defendant's house; that there were tracks of bare feet along this path which indicated that they were made by some one running; that the foot of the prisoner was placed in one of these tracks and it fitted exactly, and these tracks were followed to the prisoner's house; that the prisoner told a witness the course he went when he found the prosecutrix at the ditch, and

no tracks could be found along this course; that the prisoner appeared to be excited and nervous.

There are other circumstances which are favorable to the prisoner, and which indicate that he was endeavoring to assist and protect the prosecutrix, but it is not necessary to consider these, as the sole inquiry for us is whether there was any evidence which ought to have been submitted to the jury.

We have considered the record with the care which the importance of the issue demands, and, being of opinion that there is evidence of the guilt of the prisoner, the judgment is affirmed.

No error.

STATE v. TOBE LYERLY.

(Filed 19 May, 1915.)

Criminal Law—Larceny—Exchange of Currency Bills—Felonious Design—Trials—Instructions.

Under an indictment for larceny, where there is evidence that the prosecuting witness went into the defendant's store, handed him, at his request, a $50 bill to look at, which he carried to the back of the store and gave the witness a bill which he put into his pocketbook without examination, and ten minutes thereafter he examined the bills in his pocketbook, found a $2 bill which he had not had before, and that his $50 bill was missing; that he immediately reëntered the store, asked for the defendant, but discovered he had gone: *Held*, an instruction was correct that the jury should find the defendant guilty, should they find from the evidence beyond a reasonable doubt that the defendant obtained possession of the $50 bill with an existing felonious intent permanently to deprive the prosecutor of his ownership of the money and to convert it to his own use.

APPEAL by defendant from *Adams, J.*, at September Term, 1914, of ROWAN.

Indictment for larceny. The defendant was convicted by the jury, and from the judgment pronounced appeals to this Court.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

A. H. Price, Thomas H. Vanderford, Jr., and William C. Coughenour, Jr., for defendant.

BROWN, J. The prosecuting witness Pethel testified: "I am a fireman on the Southern Railway, and on the 20th day of June was paid off. I had a new $50 bill, and I went to the defendant's store at night and told him I had a 'pretty.' He asked to see it. I showed it to him. he took it and went to the back part of the store and stayed awhile.. I called

to him to return my money. After a while he came back and gave me a $2 bill. I did not know it at the time. I found it out after I left the store. I had a $50 bill, two $20 bills, and some $1 bills in my purse when I went to defendant's store. Did not have any $2 bills. The defendant kept the $50 bill two or three minutes before he came back to me from the rear of the store. He then gave me a $2 bill, as I afterwards found out. He kept the $50 bill. I have never seen it since. He never returned it to me."

He further testified that he then left the defendant's store and a few minutes later had occasion to look into his pocketbook and discovered that his $50 bill was missing and that he had a $2 bill in the place of the $50 bill. He immediately returned to the store and found that the defendant had left. The witness had not been gone more than ten minutes from the time that defendant took his bill until witness missed it and returned.

The defendant testified that Pethel came to his store and took out a $50 bill, and that witness looked at it in the presence of several others and gave it back to Pethel. He did not go to the rear of the store and did not give Pethel $2.

Another witness for the defendant testified that the defendant did not go to the back of the store and did not leave the place where the bill was handed to him by the prosecuting witness.

The only assignment of error is to the part of the charge of the court which appears on page 8 of the record, and in which the court instructed the jury that if they should find from the evidence beyond a reasonable doubt that the defendant obtained possession of the $50 bill, under the circumstances testified to by the prosecuting witness, with "an existing felonious intent permanently to deprive the prosecutor of his ownership in the money and to convert it to his own use, and in pursuance of such intent and in the execution of such design" did as testified to by the prosecuting witness, they should return a verdict of guilty of larceny, as charged.

The charge of his Honor is supported by the precedents. There is no pretense that the prosecutor loaned this money to the defendant. The case is properly made to turn upon the theory that the defendant was guilty of a trick or device in gaining possession of the $50, with a present felonious purpose to deprive the owner of his money and to convert it to the defendant's own use. A very instructive opinion in line with this case is *S. v. Bryant*, 74 N. C., 124. See, also, *S. v. Scott*, 64 N. C., 586; *S. v. McCrary*, 111 N. C., 665; *S. v. Henderson*, 66 N. C., 627.

No error.

STATE v. O. J. WAINSCOTT.

(Filed 24 May, 1915.)

1. Intoxicating Liquors—Indictment—Exceptions to Statute—Defenses.

An indictment for the sale of intoxicating liquor need not charge that the defendant was not a druggist, etc., duly licensed, for this is a matter of defense.

2. Evidence — Special Detective — Scrutiny and Weight—Instructions—Special Requests—Appeal and Error.

The testimony of a special detective in an action to convict the defendant of an unlawful sale of intoxicating liquor should be considered by the jury in his relation to the case, his purpose and object, and should be scrutinized and weighed by them accordingly as his interests in the prosecution may appear; and where the judge has accordingly charged, his refusal to give a special request that the testimony of the detective should be scrutinized with unusual caution will not be held erroneous.

APPEAL by defendant from *Cline, J.*, at November Term, 1914, of BUNCOMBE.

Defendant was indicted and convicted for selling intoxicating liquors to one B. H. Graham. From the judgment and sentence of the court the defendant appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

G. S. Reynolds for the defendant.

PER CURIAM. The defendant moved to quash the warrant, for the reason that it does not allege that the defendant is "other than druggist and medical depositories, duly licensed thereto." The motion was properly overruled, as the identical question has been decided adversely to the defendant's contention in *S. v. Moore,* 166 N. C., 284.

There are four exceptions relating to the admission and rejection of testimony, which we have examined, and find them to be without merit. The sixth and ninth exceptions relate to the charge. The defendant requested the court to instruct the jury that the testimony of the detective should be scrutinized with unusual caution. His Honor did not give the prayer in the language requested. Instead his Honor instructed the jury that it was contended that the witness Graham was a special detective, and he charged the jury as follows:

"Now, if he made the sale—I will instruct you about that shortly again; but I am saying, if you find that the witness Graham was impelled by any desire to catch the defendant in an unlawful act, why then you have the right to scrutinize his testimony and consider that in determining what weight and effect you will give that—what is the value of

his evidence here in this case, notwithstanding he may have borne that relation toward the defendant."

We think that is substantially an instruction to the jury that they should consider the witness Graham's relation to the case, what his purpose and object was, and that they should scrutinize and weigh his testimony according as his interest in the case may appear. We have examined the other instructions to the jury and find them without merit.

No error.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1915

PICKRELL & CRAIG COMPANY v. WILSON WHOLESALE COMPANY.

(Filed 15 September, 1915.)

1. Vendor and Purchaser—Contracts—Parol Evidence—Warranty Implied.

Where the written contract, signed by the purchaser, specifies that a cap sold for fruit jars will fit any "Mason jar," and that the terms of the contract shall not be varied by any promise or agreement not specified in the written order, a representation made by the sales agent, to the purchaser, at the time of a demonstration by him of its truth, and as an inducement to buy, that the cap sold would fit all of the Mason jars in his store, does not violate this special stipulation.

2. Vendor and Purchaser—Sale by Sample—Implied Warranty—Breach—Evidence.

While a warranty of goods which are sold in bulk by sample implies only that the bulk will come up to the sample, when the seller adopts the sample as his own description of the bulk, upon which the purchase is made, this rule does not apply when the sample is only used by the seller to demonstrate that his wares will accomplish a certain purpose, which he warrants them to do; for then it is open to the purchaser to show that the wares were not as represented, though the bulk corresponds in kind and quality with the sample, it being more than a sale by sample.

3. Same—Demonstration by Sample.

Where a certain kind of cap for sealing fruit jars is sold under a written and signed order, with the warranty that they will fit any "Mason jars," and the vendor's salesman has guaranteed that they would fit any Mason jars in the purchaser's store, and actually fitted several of the caps to the jars to prove that they would do so, it is competent for the purchaser to show that he had, at the time a quantity of Ball-Mason jars which the cap would not fit or properly seal; and upon conflicting evidence the issue should be submitted to the jury, there being evidence that the caps would not fit all Mason jars, as warranted.

APPEAL by defendant from *Carter, J.*, at June Term, 1915, of WILSON.

This action was brought to recover $130 and interest due for a lot of White Crown jar caps sold and delivered to the defendants. The

evidence tended to show that the plaintiffs both verbally and in the written order of sale represented and warranted that the caps would fit any Mason jar, in which the defendants dealt, and to convince the defendants that this was true, plaintiffs' agent, before the order was given, fitted several of the caps he then had in his possession to Mason jars selected from defendants' stock. In the body of the order are these words: "White Crown Caps. Self-sealing. Fits any Mason Jar. Experience not necessary." Defendants signed the order and delivered it to plaintiff's agent, and afterwards, and before the caps were received by the defendants, the plaintiffs sent out samples of the caps, as corresponding with those to be shipped. These were tried by the agent of defendants who gave the order, and found to be defective, in that they would not fit many of the Mason jars in defendants' stock. This was due to the fact that the Ball-Mason jars, which defendants carried in their stock, are made to receive the cap and seal at the shoulder, while the White Crown jar caps seal at the top, and the value of the cap for making an air-tight seal depended upon the smoothness of the upper surface, which was immaterial if the sealing was done at the shoulder of the jar as in the case of the Ball-Mason jars. There was evidence that "all Mason jars are of exactly the same pattern and sealed in the same way as those made by Ball Brothers." It is stated in the case that plaintiffs' witness Finis Fox, while on the stand, "proceeded to seal the Mason jars in question with the caps shipped to defendants." Defendants objected to this evidence.

When defendants discovered that the testing samples sent out by the plaintiffs would not fit many of the Ball-Mason jars in their stock, they refused to receive the shipment, and, therefore, this action was brought to recover the price agreed to be paid for the goods.

The court charged the jury as follows: "It appears from the evidence in this case that these goods were sold by sample. There is no evidence in the case that the goods shipped were not up to the sample, and there is no evidence of any other concealment. The court, therefore, instructs you that you will answer the issue $130, with interest from 15 May, 1913, if you believe the evidence in the case. Of course, if you don't believe the evidence, you will answer the issue 'Nothing.'"

The jury returned a verdict in favor of the plaintiffs for $130, with interest from 15 May, 1913. Judgment was entered thereon, and defendants appealed.

F. D. Swindell for plaintiffs.
Woodard & Hassell for defendants.

WALKER, J., after stating the case: The court held that this was a sale of goods by sample, ignoring the express terms of the written con-

tract, which warranted that the goods should be of a certain kind, or caps, that would fit *any* Mason jar. The prior negotiations of the parties were merged in the written contract, which provided that the sellers would ship the goods "on terms and conditions specified below," one of which was that the caps would fit any Mason jar, and another is, that "No promise or agreement is valid unless specified on this order," and still another, that "No salesman has authority to alter terms or conditions printed on this contract, or to promise anything that is not printed on our contracts." This was the contract, and the only one between the parties recognized by the plaintiff. It is well settled that where parties have reduced their contract to writing, the written instrument itself is the exclusive evidence of it, and neither of the parties will be permitted to vary or contradict its terms by parol. 9 Cyc., 763; *Moffitt v. Maness,* 102 N. C., 457. There is no reference in this contract to a sale by sample. We imagine that if it were to the advantage of the defendants to restrict the inquiry here to what occurred between the two agents prior to the signing of the order, the plaintiffs would have insisted upon a strict adherence to the terms of the contract as expressed in the writing; and well could they have done so.

There was some evidence of the breach of the contract or condition that the caps would fit *any* Mason jar. It is stated in the record that plaintiffs' witness "proceeded to seal the jars in question with the White Crown jar caps sold by the plaintiffs," but this expression is not very clear, and he may have referred, and perhaps did refer, to jars known as Mason jars and of the same kind as those kept by defendants in their stock for sale, and did not intend to say that he fitted the caps to the particular Mason jars which defendants then had in stock. But whatever his meaning was, and whether or not the caps used by the witness did fit the jars also used by him, which is not clearly made to appear, there was some evidence that the caps shipped to defendant did not fit the Mason jars in defendants' stock, as plaintiffs sent out a lot of samples, upon the implied representation, at least, that they corresponded exactly with those to be shipped, and for the purpose of testing the truth of their representation or warranty that those to be shipped would fit any Mason jars.

But apart from this consideration, it is not to be assumed that every sale where a sample is shown is a sale by sample. There must be an understanding of the parties, express or implied, that the sale is by sample. Tiffany on Sales, p. 174. The Court in *Gunther v. Atwell,* 19 Md., 157, at pp. 167 and 168, well stated the rule and the reason for it: "Strictly speaking, a contract of sale by sample is not a warranty of quality, but an agreement of the seller to deliver, and of the buyer to accept, goods of the same kind and quality as the sample. The identity

of the goods sold in kind, condition, and quality with that of the sample is of the essence of the contract; and where the goods sold do not correspond with the sample, there would seem to be no performance of the contract. The rule recognized in the cases as governing sales by sample seems to be founded on or to be a simple application of the principle that, to fulfill a contract of sale, the seller must deliver that which he has agreed to sell, and that if he does not, the purchaser may rescind the contract, or receive the goods and claim a deduction for their relative inferiority in value. In order that this principle may be applied, it is necessary, in making the sale, that the sample should be so used between the buyer and seller as to express or become a part of the contract; or, in other words, that the sample should amount to and take the place of an express averment by the seller of the condition and quality of the goods sold, upon which the buyer relies in making the purchase. The mere exhibition of a sample by the seller, and examination of it by the buyer, does not amount to such an everment, unless, from all the facts or circumstances in the case, it can be presumed that an understanding is arrived at between the parties that the bulk is to correspond with the sample. Citing several cases. The reasonable deduction from these cases is that to effect a sale by sample, so as to bind the seller for a correspondence in bulk, it must be shown that the seller adopts the sample as his own description of the bulk, and that the buyer concludes the purchase upon the faith and credit of the description so given. Upon this theory, it is obvious that in making sales samples may be exhibited and examined without implying, as a part of the contract of sale, any obligation that the bulk shall correspond with the sample. *Gunthrell v. Atwell, supra; Day v. Raguet*, 11 Minn., 273; *Hargous v. Stone*, 5 N. Y., 73.

There is evidence in this case that the caps were used by plaintiffs' agent in the beginning of this transaction, not for the purpose of selling other caps by them as samples, but for quite a different purpose, and that was to demonstrate to the defendants that the White Crown caps would fit any Mason jar. This will appear from the testimony of defendants' witness N. T. Peele, who said: "Plaintiffs' salesman represented that the White Crown jar caps sold by the plaintiffs, as jobbers, would fit any Mason jar. He then and there proceeded to demonstrate this fact by sealing a number of Mason jars taken from defendants' stock with the White Crown jar caps in his possession. After witnessing the demonstration aforesaid, defendants' employee, N. T. Peele, signed an order on a printed order form in which the terms and conditions of the purchase were set forth." But when the sale is by sample, it is implied in law that the bulk shall correspond in kind and quality with the sample, and the reason for this implication is that there is no opportunity

for a personal examination of the bulk. Tiffany on Sales, p. 174. There was evidence that the caps exhibited and used by plaintiffs' agent for the alleged demonstration of their quality and fitness for the particular use mentioned at the time did not correspond with the standard of comparison so used, for the plaintiffs' witnesses testified that many of the caps sent out by the plaintiffs were tried on the Mason jars of the Ball Brothers type, which were carried in defendants' stock of goods, and they did not fit, nor would they seal perfectly or as the agent of plaintiffs represented they would.

The demonstration by plaintiffs' witness at the trial may have been very impressive, and (perhaps) convincing, but its weight as evidence was for the jury, and, besides, it should not have been considered to the exclusion of other evidence in the cause.

In this state of the evidence we are of the opinion that there was a conflict, and it was erroneous to charge the jury that, even if they believed the evidence, their verdict should be for the plaintiff.

There was error, therefore, in the trial of the case.

New trial.

GEORGE H. SEXTON AND W. P. DUFF v. ELIZABETH CITY.

(Filed 22 September, 1915.)

1. Municipal Corporations—Deeds and Conveyances—Streets—Plats—Dedication—Innocent Purchasers.

Where the owner of lands plats the same into lots, streets, alleys, and parks, and in his deeds to purchasers conveys some of the lots with reference to the plats, he is ordinarily estopped, upon equitable principles, to deny a dedication of the streets, alleys, etc., or an easement therein, to the use of his grantees and the public; but when the deeds are not registered, this principle does not apply to subsequent purchasers for value of other lots contained in the plat, without actual or constructive notice of the dedication of the streets, alleys, etc., for then the equities are equal, and the maxim, "He who asks equity must do equity," also applies.

2. Municipal Corporations—Deeds and Conveyances—Streets—Dedication—Unregistered Plat—Notice.

Where lots were sold in accordance with a plat of land showing streets, alleys, parks, etc., and the deeds therefor refer to the plat in the description of the lots, and the plat or map is duly recorded, but the deeds are not; and thereafter another plat is made of the same lands, without showing thereon a certain street or alley, and other lots are sold including it, and accordingly described and conveyed, the registration of the plat, not being required or allowed by our registration laws, does not give constructive notice to innocent purchasers for value under the second plat; and there being nothing on the lands themselves to indicate that there is an alley or street at the place where one is shown on the first plat, and no evidence of actual notice to those who purchased according to the second plat, they acquire, under equitable principles, the title to their lots according to the description in their deeds.

3. Equity—Estoppel—Deeds and Conveyances—Registration—Interpretation of Statutes.

This equitable doctrine of estoppel has no application to an innocent purchaser of lands for a valuable consideration, where the party setting up the estoppel under his deed has not had the latter recorded; for no notice, however full or formal, will, under our statute, supply the place of registration. Revisal, sec. 980.

4. Municipal Corporations—Deeds and Conveyances—Notice—Innocent Purchasers.

Where an incorporated town enters upon streets or alleys according to a certain plat of lands, showing them, made by the owner, and takes them for public use, and it appears that a portion of the streets or alleys has been included in lots subsequently sold and conveyed to purchasers for value without actual or constructive notice, the act of the town, where there has been no condemnation, is one of trespass, entitling the purchasers to damages.

APPEAL by defendant from *Shaw, J.*, at June Special Term, 1915, of PASQUOTANK.

This is an action of trespass for unlawfully entering upon and occupying certain land in Elizabeth City under the wrongful claim that it is a public street or alley, and without having taken proper proceedings to condemn the same and acquire the same or an easement therein. Plaintiffs alleged in their complaints, filed in separate actions, that they are the owners of two lots, the plaintiff Sexton of lot No. 954, as designated on a map recorded in Book 21, p. 583, of the registry of said county, and the other plaintiff of lot No. 975 as shown on the same map, and that defendant had unlawfully trespassed thereon.

The defendant having answered and denied the trespass, and issue having been joined between the parties, it was stipulated that the two actions should be consolidated and heard together by the presiding judge on an agreed statement of facts, reserving the question of damages for trial by a jury.

The following is the statement of facts agreed upon:

"Pending the trial of these two actions, it is by consent of all parties to the same agreed that the two may be consolidated for the purpose of trial, and the following admissions of facts are agreed to by all parties in both cases. The question of damages, as to each plaintiff, is reserved for the jury.

"1. On or about 23 December, 1891, the Improvement Company of Elizabeth City became the owner and went into possession of all that tract of land in the present corporate limits of Elizabeth City bounded and described in a deed from C. W. Grandy, special commissioner, to said improvement company, which was duly recorded in Book 12, page 219, on 23 December, 1891, and made a part of this agreed statement of facts. Since the making of that deed and prior to the institution of this

suit in 1905, the lands described in the deed have been taken into the corporate limits of Elizabeth City by act of the General Assembly.

"2. The description in said deed includes the land in controversy in this case, and which is now claimed by the corporation of Elizabeth City as a street or alley, which strip of land is 10 feet wide and runs from Cotter Street along the east side of the Norfolk Southern Railroad Company's right of way to Main Street in Elizabeth City.

"3. On the day of the date of the deed from Grandy, commissioner, the said improvement company had W. G. Underwood, surveyor, to make and caused to be recorded on 1 March, 1892, the plat which is registered in Book 12, page 299, and made a part of this agreed statement of facts.

"4. Thereafter the said improvement company offered for sale and sold 38 lots and gave deeds for the same, referring to the plat in Book 12, page 299.

"5. None of the lots so sold abutted on said street or alley in controversy, and there was no reference in any of the said deeds to the land now claimed as a street or an alley.

"6. Thereafter the improvement company caused to be made, and registered on 28 April, 1900, in Book 21, page 583, a second plat of that part of this property conveyed by Grandy, commissioner, which lies north of what is known and designated on both plats as Oak Street, and also made a part of this agreed statement of facts, which did not show the alley or street in controversy, but extended the boundaries of each of the lots to the railroad right of way.

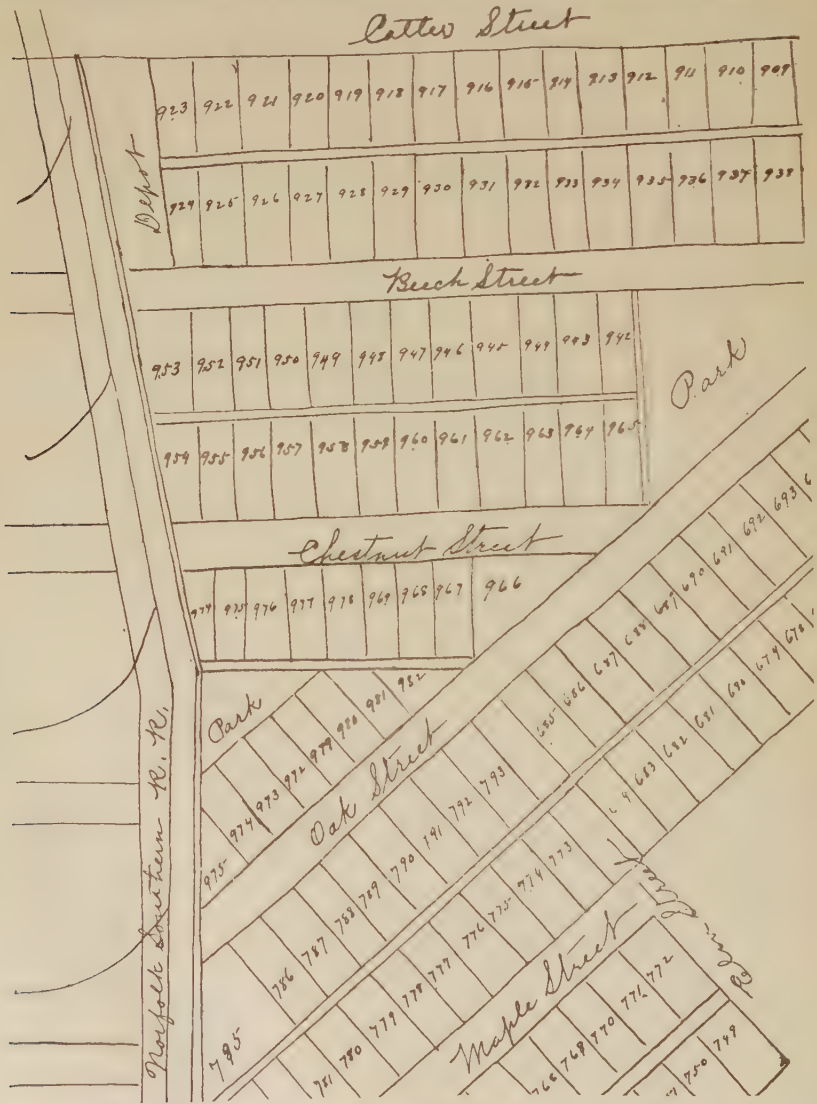
"7. On 1 February, 1908, the plaintiff George H. Sexton purchased of M. N. Sawyer and wife, in consideration of $150, the lot designated as No. 954 on the plat which is recorded in Book 21, page 583, under a deed which is registered in Book 31, page 639, and which deed is also made a part of these findings and admissions of fact.

"8. On 27 December, 1910, the plaintiff W. P. Duff purchased of R. L. Forbes, for a valuable consideration, the lot No. 975 on the plat, recorded in Book 21, page 582, under a deed which is registered in Book 35, page 6, and made a part of this statement of facts.

"9. M. N. Sawyer acquired the lot he conveyed to Sexton from W. T. Stafford by deed recorded in Book 22, page 280, and Stafford purchased the same lot from the improvement company by deed dated 8 August, 1900, recorded in Book 22, page 279, which deeds and their recitals are made a part of this statement of facts.

"10. Plaintiff W. P. Duff's grantor, R. L. Forbes, purchased the lot claimed by him from the improvement company under deed dated 8 March, 1901, and recorded in Book 23, page 138, which deed and its recitals is made a part of this statement of facts.

"11. There is no reference in either of the deeds in plaintiff Sexton's chain of title or plaintiff Duff's chain of title to the first plat above referred to, but reference is only made to the second recorded plat.



"12. At the time of making the Underwood plat there was no mark or other evidence of said street or alley in controversy on the ground, nor was any physical designation of said street or alley made on the said

premises at any time subsequent thereto until the corporation, defendant, took possession of said street shortly after the institution of these actions as hereinafter set forth.

"13. No work of any character had been done upon said street or alley to distinguish it as such or to indicate an acceptance of same by the corporation, defendant, until the taking possession of the same just before the institution of these actions as hereinafter referred to, but that the said street or alley has been up to this time continuously in the actual possession and use of plaintiffs and their grantors from the date of the improvement company's deed.

"14. There is nothing on the ground or in the course of either plaintiff's chain of title to notify said plaintiffs of the existence of said street or alley in controversy, and that neither plaintiff George H. Sexton nor plaintiff W. P. Duff had notice at the time of his purchase, nor did their grantors, other than the improvement company, have notice of the existence of said street or alley except only such notice as may be implied in law from the registration of the first plat.

"15. Just prior to the institution of these two actions, towit, on 23 July, 1913, the corporation of Elizabeth City, and the other defendants acting as its agents, went upon and took possession of the part of plaintiff Duff's and plaintiff Sexton's lots, 10 feet wide and running across each of the same, which is claimed by the said town as having been dedicated to the public, and appears upon the first plat above referred to.

"16. It is agreed that the court shall submit an issue as to the damages of the plaintiff Sexton and of the plaintiff Duff, and on the rendition of the jury's verdict on these two issues it is further agreed that if the court, as a matter of law upon the foregoing agreed statement of facts shall be of the opinion that the plaintiffs are entitled to recover, it shall render judgment in favor of each of them for the amount stated in the jury's verdict; but if the court shall be of the opinion, upon the foregoing statement of facts, that as a matter of law the defendants are entitled to recover, then the court shall render judgment in favor of the defendants."

The jury assessed the damages at $75 in each case, and the court, being of the opinion that upon the facts the plaintiffs were entitled to recover, entered judgment for the amount of the verdict in favor of the respective parties. The defendants then excepted and appealed.

J. C. B. Ehringhaus for plaintiffs.
Thomas J. Markham for defendant.

WALKER, J., after stating the case: We may say, generally, that the right to the easement in a public highway may be acquired by grant or

dedication; by the exercise of the power of eminent domain, or by user for the requisite length of time. *Kennedy v. Williams,* 87 N. C., 6. With respect to dedication, we have held in several cases that where the owner of real property lays out a town or village upon it, or even a plat of ground, and divides it into blocks or squares, and subdivides it into lots or sites for residences, which are intersected by streets, avenues, and alleys, and he sells and conveys any of the lots with reference to a plan or map made of the property, or where he sells or conveys according to a map of the city or town in which his land is so laid off, he thereby dedicates the streets and alleys to the use of those who purchase the lots, and also to the public, under certain circumstances not necessary to be now and here stated; and this is so, unless it appears either by express statement in the conveyance or otherwise that the reference to or mention of the street or streets was solely for the purpose of description, and not intended as a dedication thereof. The same rule is said to apply to such pieces or parcels of the land marked on the plat or map as squares, courts, or parks. The reason for the rule is that the grantor, by making such a conveyance of his property, induces the purchasers to believe that the streets and alleys, squares, courts, and parks will be kept open for their use and benefit, and having acted upon the faith of his implied representations, based upon his conduct in platting the land and selling accordingly, he is equitably estopped, as well in reference to the public as to his grantees, from denying the existence of the easements thus created. Many authorities sustain the principle; and the dedication, when once fully made, is held to be irrevocable. *Moose v. Carson,* 104 N. C., 431; *S. v. Fisher,* 117 N. C., 460; *Conrad v. Land Co.,* 126 N. C., 776; *Collins v. Land Co.,* 128 N. C., 563; *Hughes v. Clark,* 134 N. C., 460; *Davis v. Morris,* 132 N. C., 436 (*s. c.,* 141 N. C., 227); *Hester v. Traction Co.,* 138 N. C., 293; *Tise v. Whitaker,* 144 N. C., 514; *Bailliere v. Shingle Co.,* 150 N. C., 627.

In *Smith v. Goldsboro,* 121 N. C., 350, *Conrad v. Land Co., supra,* and *Collins v. Land Co., supra,* the principle is discussed with reference to suburban land which is divided into lots with intersecting streets and alleys, and parks and squares, and is afterwards included within the corporate limits of a town, to which case it is held to be applicable. The Court said in *Conrad v. Land Co., supra,* at page 779: "If the owner of land lays it off into squares, lots, and streets with a view to form a town or city, or as a suburb to a town or city, certainly if he causes the same to be registered in the county where the land is situated, and sells any part of the lots or squares, and in the deed refers in the description thereof to the plat, such reference will constitute an irrevocable dedication to the public of the streets marked upon the plat. We think the same principle would apply to those pieces of land which were marked

on such a plat as squares, or courts, or parks, and that streets and public grounds designated on such a map should forever be open to the purchasers and to the public. It is immaterial whether the public authorities of the city or county had formally accepted the dedication of the streets. The plaintiffs had been induced to buy under the map and plat, and the sale was based not merely on the price paid for the lots, but there was the further consideration that the streets and public grounds designated on the map should forever be open to the purchasers and their assigns, citing *Meier v. Portland,* 16 Oregon, 500; *Gorgan v. Hayward,* 4 Fed. Rep., 164; *Church v. Portland,* 6 L. R. A. (O. S.), 659; *Price v. Plainfield,* 40 N. J. Law, 608. We are not disposed to abate this principle in the least, as it is firmly established in our jurisprudence, although there are decisions in other jurisdictions which do not carry it to the full length recognized in this Court. But, as we have seen, it is entirely equitable in its nature and founded upon the idea that it would be unjust, if not fraudulent, for the landowner to question or limit the right of his grantees, who have purchased lots, to all the privileges and easements expressly given or to be implied from his conduct. The estoppel upon him, being a creation of equity for the purpose of doing exact justice, should not be enforced inequitably as against those who have purchased any part of the property in good faith, for value and without notice. The purchaser of a lot designated on the map with the streets and alleys would not come into court with clean hands should he assert a right based itself upon an equitable consideration for him, and at the same time be unwilling to accord equity to his adversary, who has bought in ignorance of his rights, especially when it was caused by his own neglect in failing to register his deed. He who would ask equity must be willing to do equity. Discussing this view of the estoppel, we said in *Green v. Miller,* 161 N. C., at p. 30: "While the rule is well established, it is necessary that in some way notice of the dedication, thus made, be fixed upon those who may buy any part of the property which is subject to or charged with the easement, or of the rights of others flowing from the dedication. It would be unjust that a rule which is based upon an equitable doctrine should in its application deprive a man of property bought in good faith, for value and without notice of the right to the easement. Parties who claim the benefit of the easement by virtue of the implied dedication can easily protect their right and interest in it by having proper reference made to the map in their deeds; and if they fail to do so, it is their own fault, and they should not be permitted to visit its consequences upon an innocent purchaser who was misled by their laches. It is held that the original grantor, who sold by the map or the diagram of the land as laid out into blocks and lots, streets, and avenues, and those claiming under him, are estopped to deny the right of prior

purchasers of lots to an easement in the streets represented on the map; but it is not a strict estoppel, but one arising out of the conduct of the party who originally owned the land and platted it for the purpose of selling the lots, and is predicated upon the idea of bad faith in him, or those claiming under him, with knowledge of the facts, or with notice thereof, either express or constructive, to repudiate his implied representation that the streets and alleys, parks and places, will be kept open and unobstructed for the use of those who may buy from him. So far as the owner is concerned, it would be fraudulent for him to contest the right of his grantees; but as to those who have bought without notice, actual or constructive, of the facts, and the equitable estoppel fastened upon him, the estoppel, grounded, as we have said, in an equitable principle, completely fails. The same general principle of equity that raises the estoppel will protect him, as an innocent purchaser, from its operation; and this is but just and right." In that case many authorities were cited which strongly sustain the first limitation of the estoppel.

One who buys property of another without notice that some third person has a right to or interest in such property, and pays a full and fair price for the same, at the time of such purchase or before he has notice of the claim or interest of such other in the property, takes the same free from the right of the other, because he is regarded as an innocent purchaser and entitled to the equitable consideration of the court. It is a perfectly just rule, and it would be strange if the law were otherwise.

It is said in 13 Cyc., at pp. 492, 493, that, with the exception of *bona fide* purchasers for value and without notice, all parties holding under a dedicator take only his title. "The general rule as to the title taken by a *bona fide* purchaser without notice applies where the encumbrance is a dedication to the public use. Usually the state of the property or the records constitute notice by which the purchaser is bound, whether his knowledge of the easement be actual or not." 13 Cyc., *supra.*

The doctrine, as directly applicable to this case, is well stated in *Schuchman v. Borough of Homestead*, 111 Pa. St., 48: "It is reasonably certain that the Homestead Bank and Life Insurance Company dedicated the land to the public, and that a number of persons purchased lots expecting to enjoy the resulting advantage. However, nothing in the plan, or in the course of the title, or on the ground, was a warning to Ormsby Phillips of such dedication, and, therefore, he acquired a good title. The citizens of the borough suffer serious loss under the operation of a rule which applies to them as it would to an individual under similar circumstances." And in *Harboro v. Smith*, 85 Md., 538, the Court said: "It may be conceded that if there were any owners of lots who purchased under such circumstances and without notice of the contract or the agreement between the Patapsco and Brooklyn companies, they would have a standing in a court of equity."

This same rule, we think, was impliedly recognized by this Court in *Collins v. Land Co.*, 128 N. C., 563, and *Conrad v. Land Co.*, 126 N. C., 776. It is true that the Court said, in the *Collins case,* that registration of the map is not essential, as it is not such an instrument as is required to be registered, but afterwards, and in the same connection, explains what is meant by stating stressfully that the subsequent purchaser (Asheville Land Company) "had actual notice of the plat and the sales thereunder made by the improvement company, and is, therefore, fixed with notice of the dedication of the streets. Besides, it had notice from the registration of the deeds of the latter company."

It may be well to remark that in all of the cases decided by this Court the subsequent purchaser, claiming the land occupied by a street or alley, as against a vendee from the original owner who bought according to the map, appears to have had either actual or constructive notice of the latter's rights and easements in the abutting and adjacent streets and alleys.

Applying these principles to the facts of our case, we find that the case agreed (sections 4, 5, 11, 12, 13, and 14) is very full and explicit in stating that plaintiffs had no actual knowledge of the dedication of the alley by the improvement company, and there was nothing on the ground to indicate that it had been set apart as an alley for the use of the public or the owners of the thirty-eight lots theretofore purchased from said company, nor was there any constructive notice, as the deeds for the thirty-eight lots were not registered, so far as appears. The registration of the map was not constructive notice, as it is not such a paper as is required or allowed to be registered by our law. On the contrary, the plaintiffs bought their lots by another map, which was made by the improvement company long after 1 March, 1892, when the first map was registered, that is, in April, 1900, and their deeds referred to this map, which did not show the alley, but, on the contrary, made the line of the railway's right of way the boundary of the improved property on that side, and in the description of these lots the railway was called for as one of these lines. Instead of having any notice of the alley being there, they were actually and positively led to believe that there had been no such dedication, and they acted upon the representation thus made to them, in good faith, and paid full value for the lots. As the registration of the first map was not constructive notice to them, and they had no actual notice of it, they occupy a most favorable position before the court, and are entitled to the protection of the principle which we have said has been settled by the authorities. Besides, as they had no actual notice, our statute which requires the registration of deeds as to *bona fide* purchasers for value, in order to pass the title, Revisal, sec. 980 (Acts of 1885, ch. 147), protects them against the application of the ordinary

doctrine of estoppel relating to such cases. The policy of our law now is that purchasers for value should be protected as against unregistered conveyances of the same property from the vendor, as nothing but registration shall be considered notice to them of any prior deed for the land, it having grown into an axiom that "No notice, however full and formal, will supply the place of registration." *Todd v. Outlaw,* 79 N. C., 235; *Piano Co. v. Spruill,* 150 N. C., 168. We have said that the deeds to the thirty-eight lots were not registered, as the case does not state that they were, and what does not appear is presumed not to exist. Broom (6 Am. Ed.), star p. 163, says that, "On a special verdict the court will not look out of the record, nor assume a fact not stated therein, nor draw inferences of fact necessary for the determination of the case from other statements contained therein. Also, "In reading an affidavit, the court will look solely at the facts deposed to, and will not presume the existence of additional facts or circumstances in order to support the allegations contained in it. To the above, therefore, and similar cases, occurring not only in civil, but also in criminal proceedings, the maxim, *Quod non apparet non est*—that which does not appear must be taken in law as if it were not—is emphatically applicable."

As the plaintiffs had no actual or constructive notice of the dedication of the alley, they are not bound by the map, and in unlawfully entering on the property which was theirs, the defendant committed a trespass. *Green v. Miller, supra.*

There was, therefore, no error in the judgment upon the case agreed.

Affirmed.

JOHN D. ELLIOTT v. ROANOKE RAILROAD AND LUMBER COMPANY.

(Filed 22 September, 1915.)

1. Trespass—Title—Burden of Proof.

The weakness of the defendant's title to land will not avail the plaintiff in an action of trespass involving title, for he must recover, if at all, upon the strength of his own title.

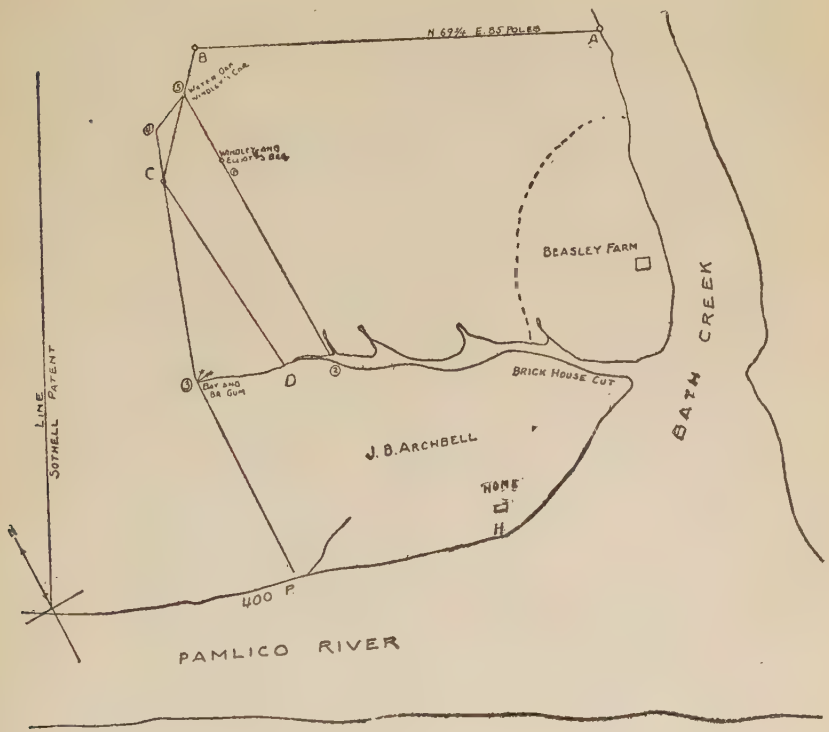
2. Same—State Grants Deeds and Conveyances Color—Plaintiff's Evidence.

Where the plaintiff's own evidence, in an action of trespass on lands involving title, tends to show sufficient adverse possession of the defendant under color to take the title out of the State and ripen it in defendant, or in one under whom he claims, and the plaintiff is claiming the *locus in quo* by grant from the State, issued after the title had ripened, he cannot recover.

APPEAL by plaintiff from *Justice, J.,* at February Term, 1915, of BEAUFORT.

Civil action for trespass on land.

Daniel & Warren and Bryan & Stewart for plaintiff.
Small, McLean, Bragaw & Rodman for defendants.



herd, commissioner, and Bryan to Beasley; but it is not necessary to set it out, in the view we take of the case. Judgment was entered for defendant, and plaintiff appealed.

It is well settled that plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of his adversary's title. It was said in *Wicker v. Jones,* 159 N. C., at p. 116: "The paintiff must recover upon the strengeth of his own title, and upon failure of proof by him the jury will find that he is not the owner of the land, although satisfied that the defendant has no title." This is also true in an action

of trespass where plaintiff relies solely upon his title and constructive possession, and not upon his actual possession. *Waters v. Lumber Co.*, 154 N. C., 232. So, in this case, as plaintiff by his own evidence has shown that at the time the grant issued to him the State had no title, as it had been lost by adverse possession of Archbell, which was begun and continued for the requisite period of time, he failed to show any title to the land, and, therefore, no such constructive possession thereof as would entitle him to sue in trespass. His own testimony proves that the Beasleys were in possession of their land for many years—as long as he could recollect—and John Archbell and those claiming under him had been in possession of the land adjoining the Beasley land on the west ever since he had known it—fifty years or more. This being so, it can make no difference where the western line of the Beasley tract is, that is, whether it is where the plaintiff claims it is, or where the defendant claims it to be.

In this view of the evidence it would be useless to discuss the interesting question raised by the plaintiff, as to whether the possession of the defendant, and those under whom it claimed, was extended to the boundaries of the Shepherd deed, without actual possession of some part of the land embraced by that deed, and not covered by the deed of Bryan to Beasley, dated 19 March, 1846. The point being that as Thomas Beasley had already acquired title, under the Bryan deed as color, by adverse possession, which afterwards passed to defendant, his possession of that tract of land being rightful, would not be extended to the outer boundaries of the Shepherd deed by construction of law. The gist of the contention is that it is only where the possession has not ripened the color into a good title, and the occupant is still exposed to an action of trespass, that the law will extend the possession contructively to the boundaries of the deed under which, as color of title, the possession is held, citing for this position *Lewis v. Covington*, 130 N. C., 544. Nor is it needful to consider the status and legal effect of the grant from Lords Proprietors to Seth Sothell, dated 10 November, 1681, for the land in controversy. It is quite sufficient, in order to dispose fully of this appeal, that we confine ourselves to the single question as to the force and effect of the plaintiff's own testimony upon his right to recover, remarking generally, and without more particular reference thereto, that there are other obstructions in the way of plaintiff's recovery.

There was no error in the proceedings above, and it will be so certified.

No error.

J. H. MITCHELL v. THE ELIZABETH CITY LUMBER COMPANY ET AL.

(Filed 29 September, 1915.)

Attachment—Nonresidents—Replevy Bond—Appearance—Submission to Jurisdiction—Interpretation of Statutes.

Where proceedings in attachment have been properly entered and prosecuted against a nonresident defendant having property in this State, except that no order for or publication of the summons or personal service has been made, a bond given by defendant in discharge of the writ is a voluntary submission of defendant's cause to the jurisdiction of the court, our statutes, Revisal, secs. 774 and 775, requiring that such bond shall only be received after a general appearance entered, etc..

APPEAL by defendants from *Ferguson, J.,* at April Term, 1915, of HERTFORD.

Civil action heard on motion to discharge an attachment and dismiss the action.

On the hearing, it was made to appear that plaintiff, having a claim against defendants for wrongful injury to his property, instituted an action by issuing a summons against them, returnable to February term of said court, 1915; that on affidavit duly made, averring validity of claim, that defendants were all nonresidents and that they had property within the State, etc., a warrant of attachment was duly issued, returnable to said February term, and, acting under said warrant, the sheriff levied same on lot of personal and real property belonging to defendants and made return thereof in proper form to the court; that after the institution of said suit and warrant and the levy thereof, towit, on 7 December, 1914, defendants gave bond in discharge of the attachment, as required by the statute. At February Term, 1915, the complaint having been duly filed, but no summons having been served on defendants or either of them, and no publication having been made or order therefor obtained, defendants, by their counsel, claiming to make a special appearance, moved to discharge the attachment and dismiss the action, on the ground that this issuing and the summons had not been properly followed by service of summons on defendants, either personal or by publication. The court, being of opinion that the giving of the bond was equivalent to personal appearance of defendant and constituted a waiver of the defects suggested, denied the motion, and defendants, having duly excepted, appealed.

Winborne & Winborne for plaintiff.
E. T. Snipes, D. C. Barnes for defendants.

HOKE, J., after stating the case: It was suggested on the argument that the defendants' appeal might be premature, but our decisions are to the effect that the refusal to dismiss a warrant of attachment is an ap-

pealable order, and, unless appealed from, the questions involved become *res adjudicata*. *Judd v. Mining Co.*, 120 N. C., 397; *Sheldon v. Kivett*, 110 N. C., 408; *Roulhac v. Brown*, 87 N. C., 1. On the principal question, while it is recognized, as contended by defendant, that when an attachment has been issued it must be followed by service of the summons, personally or by publication (*Finch v. Slater*, 152 N. C., 155), we concur in the view of his Honor, that where property has been levied on under the writ, a bond given by defendants in discharge of the attachment as provided by the statute will be considered equivalent to a personal appearance in the action and a waiver of the requirement for further service of the summons. It amounts to a voluntary submission of defendant's cause to the jurisdiction of the court. This is stated for law in Drake on Attachments, sec. 332; and in Shinn on Attachments, sec. 288, the author says that it has been so held in courts where the question had been presented. The cases referred to by these authors are in full support of their statements. *Blyler v. Kline*, 64 Pa. St., 130; *Richard v. Mooney*, 39 Miss., 357; *Cheatam v. Morrison*, 37 S. C., 187. While this ruling may be departed from or modified in some jurisdictions, owing to varying provisions of their statutes controlling the subject, the Legislature in this State, Revisal, secs. 774 and 775, clearly contemplates that a bond given by defendant in discharge of the writ shall only be received after a general appearance entered. The very form of the bond given by defendant and sureties pursuant to our statute would seem to justify such a position, the instrument signed by defendants and their sureties stipulating that if the property levied on be delivered to defendants they will return the property, "provided said plaintiffs recover judgment in the action," and pay all costs awarded against them, and in default thereof, will pay to plaintiffs the value of said property and all costs and damages that may be awarded against them in the action.

We find no error in his Honor's ruling, and the judgment below is Affirmed.

MARY P. WESTON v. JOHN L. ROPER LUMBER COMPANY.

(Filed 29 September, 1915.)

1. **Deeds and Conveyances—Title—Common Source—Paramount Title—Evidence.**

Where there is evidence tending to show that the parties to the action claim title to the land from a common source, one of them may prove an outstanding paramount title acquired by himself; and where he has offered in evidence a conveyance from the State Board of Education to State's lands, and connected himself therewith, this may be rendered nugatory by his adversary showing that the land had previously been granted by the State to another.

2. Deeds and Conveyances—Partition—Title—Estoppel—Evidence.

The plaintiff's title to the lands in controversy further depending upon the defendant's being estopped to deny his title by a judgment in proceedings for partition, wherein the title to the lands was not involved (162 N. C., 165), it is held that a judgment of nonsuit was properly entered in the lower court under the authority of the former opinion, which position is further strengthened in this appeal tending to show they had no title at the time of the proceedings.

3. Deeds and Conveyances—Judgments—Executors and Administrators—Sales—Devisee—Sci. Fa.

A deed in plaintiff's chain of title upon which he relies which recites, in effect, that it was made under a *fieri facias* issued upon a judgment recovered against an executor of the deceased owner, and that the lands sold were in the hands of a devisee, is fatally defective, there being no recital therein of a *sci. fa.* or that any notice or other process issued to the devisee, or that any judgment was rendered condemning the lands; for the devisee is entitled to his day in court to contest the plea of fully administered, etc., and thereby relieve his land.

4. Deeds and Conveyances—Chain of Title—Descriptions—Evidence.

A deed in the chain of title claimed by a party in this action to recover lands is ineffectual for the purpose when it appears from the description therein that it does not purport to convey the *locus in quo.*

WALKER, J., dissenting in part; HOKE, J., concurring in the dissenting opinion.

APPEAL by defendant from *Whedbee, J.,* at March Term, 1915, of CAMDEN.

This is an action to recover land, and involves the title to tracts Nos. 1 and 4 of the juniper timbered part of that portion of the Dismal Swamp called "The New Lebanon Division," and the only question involved in the appeal is whether the plaintiff made out a *prima facie* case to go to the jury upon the question of title, to either or both of said tracts.

The title to these two tracts of land was under consideration at March Term, 1912, of the Superior Court of Camden County, and the said cause was argued before this Court at its Fall Term, 1912, and decided adversely to the plaintiff, appellant in this action, and is reported in 162 N. C., pages 165 *et seq.* Upon said appeal being certified to the Superior Court of Camden County, the court ordered a nonsuit, and plaintiff instituted this new action, making practically the same allegations of title and trespass.

The court below held that on all the evidence offered, plaintiff had not made out any title.

The opinion of the Court, by *Mr. Justice Brown,* on the former appeal discloses, according to said opinion, certain defects in the title as it was then presented, but which the plaintiff has undertaken to remedy in this case.

In that appeal it will be noted that the plaintiff relied on what is

known as and will be hereinafter referred to as *The New Lebanon Division,* for a common source of title. In that division tract No. 1 was allotted to Enoch Sawyer, and tract No. 4 was allotted to Fred B. Sawyer and Samuel Proctor. Tract No. 12 was allotted to Mills and Josiah Riddick.

Plaintiff then offered a deed from Enoch Sawyer to Cary Weston for lot No. 1 and a deed from Samuel Proctor to Cary Weston for his interest in lot No. 4, and evidence to show that he was the only living descendant of said Cary Weston.

Plaintiff then offered a deed from Mills Riddick to William B. Whitehead, a deed from William B. Whitehead to Baird & Roper, and a deed from Baird & Roper to the defendant for tract No. 12 of that division, thus connecting the plaintiff and defendant with said division; claiming it to be a common source of title.

The defendant, for the purpose of showing an independent and outstanding paramount title, introduced a deed from the State Board of Education to George W. Roper, dated in 1904, and a deed from George W. Roper to the defendant in 1905, which covered the same land.

The plaintiff then offered section 1 of the amended complaint and section 1 of the answer thereto, for the purpose of showing that the lands in controversy had been granted to Benjamin Jones on 10 July, 1788; and said answer on that allegation was as follows: "The defendant admits that on 10 July, 1788, the State of North Carolina issued a grant to one Benjamin Jones. That there appears upon the books found in the office of the register of deeds of Camden County, in Book D, page 163, what purports to be copy of said grant. The other matters alleged in section 1 are denied."

It is held in the opinion of the Court that section 1 of the answer denied not only the validity of that grant, but, also, that its descriptive words embraced the land in controversy, and that the record failed to disclose that there was any evidence that the description in the grant covered the lands in controversy, and, therefore, plaintiff could not recover in that suit, and ordered a nonsuit, stating:

1. That there is no strict estoppel operating in favor of the plaintiff against the defendant in respect to lots 1 and 4;

2. That the parties do not claim the same tract of land under the same common source;

3. That if that were so (that is, if they did hold the same tract of land under the same common source), the defendant has shown an outstanding legal title, paramount, and connected itself with it.

On the second trial plaintiff offered a grant from the State of North Carolina to one Benjamin Jones, dated 10 July, 1788, and offered evidence that the grant covered the land in controversy.

This is the material difference between the two appeals as to lot No. 1.

As to lot No. 4, the plaintiff offered two chains of title. The first of these is as follows:

(1) Grant to Benjamin Jones.

(2) Deed from Benjamin Jones to Thomas Harvey.

(3) Deed from Thomas Harvey and Benjamin Jones to John Shaw.

(4) Deed from John Show to Samuel Bartleson.

(5) Deed from Samuel Bartleson to John and David Christie.

(6) Deed from Isaac Lamb, sheriff, to Robert Porter.

(7) Deed from John and David Christie to Caleb North, Charles Jolly, and Robert Porter, trustees.

(8) Power of attorney from Caleb North and Robert Porter to F. B. Sawyer.

(9) Deed from Robert Porter and Caleb North, by F. B. Sawyer, attorney, to Joseph and Bornt Seguine.

(10) Deed from Robert Porter and Caleb North, by F. B. Sawyer, attorney, to Samuel Weston.

(11) Deed from Seguine and Weston to Samuel Proctor.

In the second, the first seven deeds are the same as those in the first chain of title, and in this chain of title the plaintiff relies upon a deed from Isaac Lamb, sheriff, to Richard Morris, which, in addition to reciting a levy under a *fieri facias* and a sale thereunder, contains the following recitals:

Whereas by a writ of *fieri facias* issued out of the county court of Camden, bearing date February Term, 1810, directed to the sheriff of Camden County, whereby he was commanded in the following words, viz.:

State of North Carolina,

To the Sheriff of Camden County—Greeting:

We command you that of the lands and tenements whereof Will Aitchison died seized and possessed in your county, in the hands of William Nicholson, and which he holds by devise from the said William Aitchison, you cause to be made the sum of one thousand and twenty pounds three shillings and fourpence, which lately in the county court of pleas and quarter sessions held for Camden County Benjamin Jones's executors recovered against Mary Aitchison, executrix of William Aitchison, deceased, for damages. And also the sum of nine pounds seven shillings and sixpence for the cost and charges by him in suit expended, whereof the said Mary Aitchison, executrix as aforesaid, is convicted and liable as to us appears of record. And have you the said moneys before the justices of the said court to be held for the said county at the courthouse in Camden on the first Monday in February next, then and

there to render to the said Benjamin Jones's executors for his damages, cost and charges aforesaid. And have you then and there this writ. Witness Malachi Sawyer, clerk of the said court, the 9th day of November, in the 34th year of the Independence of the State, Anno Dom. 1809.

(Test.) MALACHI SAWYER, C. C. C.

In the New Lebanon Division, which is relied on by the plaintiff as an estoppel, there were several distinct tracts of land, one of which was called the juniper swamp land or juniper timbered land, and another tract of upland called the mill swamp.

The plaintiff introduced evidence tending to show that the juniper timbered land was covered by the grant to Benjamin Jones, but there was no evidence that the grant covered the upland known as the mill swamp land.

The deed from Seguine and Weston to Samuel Proctor purports to convey "the one-sixteenth part of the upland or mill tract of the New Lebanon estate."

At the conclusion of the evidence his Honor entered judgment of nonsuit, and the plaintiff excepted and appealed.

Charles Whedbee and Ward & Thompson for plaintiff.

W. B. Rodman, J. K. Wilson, W. L. Halstead, and Small, MacLean, Bragaw & Rodman for defendant.

ALLEN, J. No case has been more carefully investigated or more deliberately considered by this Court than the one involving the same subject-matter between the same parties, reported in 162 N. C., 165, and the only material difference in the facts, so far as they relate to lot No. 1, is that upon the first appeal the plaintiff did not introduce a grant from the State covering the land in controversy, while on this appeal a grant from the State is in evidence.

This difference in the facts changes the legal aspect of the two appeals, because, with no grant in evidence, the Court dealt with the deed of the State Board of Education to the defendant as a paramount outstanding title which the defendant had the right to acquire; but when it is shown that the land had been previously granted, as now appears, the deed of the State Board of Education has no legal effect, and must be eliminated from consideration.

It will be seen, however, from an examination of the opinion of the Court in the former appeal, written by *Associate Justice Brown*, that it is not based alone upon the title of the defendant procured from the State Board of Education, but that, in addition thereto, it was held that as partition proceedings are primarily for the purpose of severing the

possession, and as there was no allegation in the petition that the tenants in common were the owners in fee, and as title was not put in issue in the proceeding, that the partition proceeding of 1815 did not operate as an estoppel, and as the plaintiff could not recover unless it was held that the parties to this record were estopped, the judgment of nonsuit then entered was sustained upon this additional ground.

A separate concurring opinion, in which the *Chief Justice* then concurred, and in which *Associate Justice Brown* now concurs, was then filed by the writer of this opinion, beginning at page 174, in which the consideration of the deed from the State Board of Education was entirely eliminated and which rested upon two propositions: (1) that the implied warranty of title existing between tenants in common is broken by alienations, and does not prevail between the grantees of the several tenants acquiring title after the partition. (2) That the partition proceeding of 1815 did not constitute an estoppel as to the ownership in fee of the land in controversy.

The concluding sentence of this last opinion is: "This disposes of the appeal, and it is unnecessary to discuss the validity of the deed of the State Board of Education to the defendant or of the right of the defendant to rely upon this deed as an after acquired title."

The reasons and authority then relied on in support of the opinion of the Court are satisfactory to us, and in our judgment are conclusive against the title of the plaintiff to lot No. 1.

The introduction of the grant from the State to Benjamin Jones, instead of weakening this position, that the defendants are not estopped to deny that the parties to the partition proceeding were the owners in fee of the land described therein, confirms it, because it shows that the fee-simple title was not then in the parties to the proceeding, but in Benjamin Jones under the grant.

We are also of opinion that his Honor properly nonsuited the plaintiff as to lot No. 4.

One of the deeds in the first chain of title to this lot, introduced by the defendant, and which is necessary to complete it, is the deed from Seguine and Weston to Samuel Proctor, and it appears from the description in this deed that it does not purport to convey any part of the "juniper timbered land," but only an upland tract, and there is no evidence that the grant from the State covers the upland.

In the second chain of title to lot No. 4, a deed upon which the plaintiff has to rely is one from Isaac Lam, sheriff, to Richard Morris, which recites that it was made pursuant to a sale under a *fieri facias* issued upon a judgment recovered by Benjamin Jones's executors against Mary Aitchison, executrix of William Aitchison, and that the land sold was in the hands of William Nicholson, devisee.

There is no recital in this deed that any notice or other process issued to the devisee or that any judgment was rendered condemning the lands in the hands of the devisee, and this is fatal to the deed.

In *Barrow v. Arrenton*, 23 N. C., 228, *Gaston, J.*, referring to the act of 1784, says: "Since this act, therefore, whatever doubts might have been entertained before, the law is positive that the lands of a deceased debtor in the hands of his heirs cannot be sold, upon a judgment obtained against an executor or administrator, until after a *sci. fa.* shall issue to the heirs to show cause, if any they have, why execution of said judgment shall not issue against the land."

Judge Gaston further says: "That act, after reciting that doubts were entertained whether the lands of deceased debtors, in the hands of their heirs or devisees, should be subject to the payment of debts upon judgment against executors or administrators, *in order to remove such doubts thereafter, and to direct the mode of proceeding in such cases*, enacted that when in an action at law an executor or administrator should plead fully administered, no assets, or not sufficient assets to satisfy the plaintiff's demand, and such plea should be found in favor of the defendant, the plaintiff might proceed to ascertain his demand and sign judgment; but before taking out execution against the real estate of the deceased debtor, a writ or writs of *scire facias* should issue, summoning the heirs or devisees of such debtor to show cause wherefore execution should not issue against the real estate for the amount of such judgment, or so much thereof as the personal assets were not sufficient to discharge; and that if judgment should pass against the heirs or devisees, or any of them, execution should issue against the lands of the deceased debtor in their hands."

The purpose of the *sci. fa.* to the heir or devisees was to give him a day in court in order that he might contest the plea of fully administered and show that there was personal estate applicable to the payment of the judgment, and thereby relieve his land.

The judgment must be

Affirmed.

WALKER, J., dissenting in part: I cannot agree to the opinion of the Court in this case so far as it affects lot No. 1. I still think that the defendants were estopped by the partition proceedings of 1815. My views, in which *Justice Hoke* concurred, are fully stated in the report of the former appeal, 162 N. C., 165, and I will not repeat them here. The opinion of the Court, to my mind, is based upon two errors, one of law and the other of fact. The error in law is the holding that the judgment in a partition proceeding does not create an estoppel as between the tenants to deny the title or ownership, and the error of fact is that the court

assumes, contrary to the record in the proceeding of 1815, that there was no allegation that the tenants were the owners of the land, and consequently there was no adjudication as to the title; whereas an inspection of the record will disclose that such was not the case; all of which was set out by me in my former dissenting opinion.

I concur in the opinion of the Court as to lot No. 4.

JUSTICE HOKE concurs in the dissenting opinion of WALKER, J.

JOHN SPRUNT HILL v. B. S. SKINNER, MAYOR, AND THE BOARD OF ALDERMEN OF THE CITY OF DURHAM.

(Filed 22 September, 1915.)

1. Municipal Corporations—Elections—Bond Issues—Statutory Notice—Interpretation of Statutes.

The statutory requirement that notice be given of the opening and closing of places of registration, and that the registration be kept open and accessible for a specified time, are regarded as essentials by the courts in passing upon the validity of bonds to be issued by a municipality for the purpose of constructing a waterworks plant; but where it appears that full notice of the election was given, including a notice therein that there would be a new registration, and that the books were afterwards opened for a time actually sufficient to afford all an opportunity to register, though short of the legal period, and it further appears that the election has been hotly contested by both sides, each of which thoroughly canvassed the voting precincts and extensively advertised the election and registration in the local newspapers and otherwise, resulting in an unusually large vote cast at the election, and there has been given to all a fair and full opportunity to vote; that there has been no fraud, and the election was in all respects free from taint or suspicion, and that no material change in the result of the election could otherwise have been produced if the statute had been strictly complied with, the law, looking to the substance and not so much to the form, will not set aside the expression of the popular will for the issue of bonds, as expressed at the election, and enjoin the execution and sale of the bonds thus approved, because of the failure to keep the registration books open for the full time required by the statute.

2. Same—Appeal and Error—Injunction—Findings of Facts—Supreme Court.

It appearing from the record on appeal, in this action to restrain a municipality from issuing bonds in order to acquire a waterworks plant, that the result of an election held for the purpose of voting on the question would not be affected by the failure of the officers to give certain full notice of places of registration, and that the election was fair, offering full opportunity to the people for voting, the order of the lower court, continuing a previous order restraining the issuance of the bonds, is reversed, and the injunction dissolved, though the lower court failed to find the facts stated, this Court exercising its right to do so.

ALLEN, J., dissenting; HOKE, J., concurring in the dissenting opinion.

HILL *v.* SKINNER.

CIVIL ACTION, heard before *O. H. Allen, J.*, at Oxford, on 27 July, 1915, upon an application for an injunction. Upon the granting of the injunction defendants appealed.

Plaintiffs sought to enjoin the defendants, as mayor and aldermen of the city of Durham, from issuing bonds of said city in the sum of $500,000, and from levying any tax for the payment of the principal or interest thereof, for the purpose of providing a municipally owned system of waterworks under Private Laws 1913, ch. 336, or any other supposed authority of law. An election was held in said city, at which the question of issuing the said bonds was submitted to the people, in accordance with an order of defendants at a regular meeting of the municipal council on 14 February, 1914, requiring that an election for said purpose should be held on 21 April, 1914, and at the same time a new registration for the said election was ordered. It is not disputed that due and formal notice of the election was given, but the plaintiff attacks the validity of the election upon two grounds: (1) That thirty days notice of the time for opening and closing the registration books and of the places of registration was not given. (2) That the registration books were not kept open and accessible to the voters of the city for twenty days, as required by law. There were 1,322 voters who registered for the election and 988 votes were cast, of which 826 were in favor of the bond issue and 162 against it. It appears from the affidavit of George W. Woodward, clerk of the board of aldermen, who examined the records of the city for the information he gave, that only twice have so many votes been cast at such an election, and both of those elections occurred a year or more before the one in question, viz.: at the school bond election, 2 May, 1915, the total vote was 1,070; at the election on the commission form of government, 21 April, 1913, it was 919; but at the election of aldermen, 7 May, 1913, it was only 448, and at the same kind of election, 5 May, 1915, it was 572, and at the elections in the city since May, 1905, it has varied, at times, considerably, between 448 as the lowest to 1,070 as the highest vote cast. The qualified voters at the water bond election, 21 April, 1914, numbered 1,197, or 125 short of the registered vote, and at the new charter election, 17 March, 1915, they numbered 1,448. There was evidence before the judge who heard the case that two active and opposing leaders in the water bond election of April, 1915, and in the canvass preceding it, which was warmly and zealously conducted, had, some time before the day of the election, obtained from the tax books in the hands of the deputy sheriff of the county, with his assistance, two accurate lists of all the qualified voters of the city, which embraced those who had paid their taxes and those exempt from taxation, and one of those lists showed the number of qualified voters to be 1,392. Upon investigation, Mr. Brogden, who favored the bond issue and who got one of the lists, found that

it included the names of some persons who had died and of others who had removed their residences from Durham, and of others who were not entitled to vote for other reasons. It was afterwards agreed between Mr. Brogden and the other gentlemen who opposed the bond issue, by way of estimate only, that the qualified voters of the city did not exceed 1,300 in number. The campaign for and against the bonds, it appears from the proof, was carried on with unusual activity and unabated ardor and zeal, each side endeavoring to poll its full vote, and searching constantly for those who had become of age since the time for listing taxes had expired and for any persons exempt from taxation and whose names, therefore, did not appear on the tax books. Meetings were held by one if not both factions to find the voters and bring them to the polls, and no pains seems to have been spared in the effort to obtain a full vote. The rivalry was great, if not intense, and by the efforts of the two bodies, who were working for different results, but for a large vote, it seems that every available voter was not only notified of the registration and election, but was urged to qualify himself and cast his vote at the election. We cannot read the evidence without being convinced that every voter had actual, as well as formal, notice of the election, and actual notice of the registration and a full opportunity to cast his vote for or against the issue of bonds, had he so desired. There is ample evidence that the question was thoroughly advertised in the two daily newspapers, with urgent appeals to the voters to register and vote, owing to the great importance of the result to the city, and this was done continuously and long before the day of election. There is other evidence which, taken by itself, shows that 826 voters represented a majority of the electorate, and this may safely be taken as the fact.

There is a class of evidence tending to show, and we find the fact so to be, that from 17 February, 1915, to 21 April, 1915, both dates inclusive, the election was thoroughly though informally advertised, and many articles were published which called public attention to it, and the passage of the measure was warmly advocated. These articles appeared from day to day in the *Durham Sun* and the *Morning Herald,* newspapers published daily in the city, and discussed the merits of the question "pro and con." The issue of 17 February, 1915, announced the decision of the board of aldermen to order the election on the third Tuesday of April, which was the 21st day of that month, and also stated that a new registration had been ordered for the election. We insert this extract from the complaint: "Notice of said new registration was published for the first time in the *Durham Daily Sun* on 20 March, 1914, and the first time in the *Morning Herald* on 21 March, 1914; that the registration books for said election were opened on Friday, 3 April, 1914, and closed on Saturday, 11 April, 1914, at 9 o'clock p. m., and

that the thirty days notice of said new registration by advertisement in some newspaper was not given as required."

The notice of the registration was ordered to be given on 18 March, 1915, and was published as above stated, but as a part of the election notice, and in it the places of registration, names of registrars and judges of election, and the first day of registration, 3 April, 1915, were clearly stated. The notice further set forth that the books for registration would be kept open after 9 o'clock p. m. on each day, Sunday excepted, and except on Saturdays, wthen they would be closed at 9 o'clock p. m. The books were finally closed on Saturday, 11 April, 1915, at 9 o'clock p. m.

The learned judge, after hearing the evidence and argument of counsel, but without finding any facts, held that the injunction prayed for should be granted, and a judgment to that effect was entered, whereupon the defendants appealed.

R. P. Read and E. J. Hill for plaintiff.

J. L. Morehead, W. B. Guthrie, P. C. Graham, Victor S. Bryant for defendants.

WALKER, J., after stating the case: The law does not provide for notices of an election and the registration of voters, a preliminary thereto, as mere idle ceremonies, to be given or not, as may suit the whims or convenience of those who may have the calling and conduct of the election and its machinery in charge, but it is intended to be a serious and important part of the procedure under which the election is called and held, and is not to be neglected or omitted, under any circumstances, by those to whom has been intrusted the duty of complying with the law. It is always to be considered as an essential to a regular election and not as a mere nonessential which will have no weight with the courts in deciding as to the validity of an election, for the contrary is true. But the object of notice, both of the election and the registration, is to afford an opportunity to every qualified voter to express his opinion on the question submitted to the people for their approval or disapproval, and if the notice is not given as required by the law, and it further appears that, by reason of the omission, this fair opportunity has not been given to the voters, the election will be declared as void, if thereby the result would be materially affected.

While, so far as the officers are concerned who are charged with the duty of giving the notice, the requirement as to notice is imperative, yet it will be regarded, otherwise, as directory, if the result would not be changed by a departure from the provisions of the statute. The law looks more to the substance than to the form, and if it appears that a clear majority of the qualified voters have cast their votes in favor

of the proposition submitted to them, and that there has been a fair and full opportunity for all to vote, and that there has been no fraud, and the election is in all respects free from taint of any sort, so that no well-founded suspicion can be cast upon it, it would be idle to say that this free and untrammeled expression of the popular will should be disregarded and set aside. If a set of men do that, in the same way and with the same effect, which they could only have done if there had been notice to do it, and there would be no essential difference in the result with or without the notice, the law attaches less importance to the giving of notice under such circumstances, and will not invalidate the result. Our own decisions, and those in other jurisdictions, though there are a few to the contrary, strongly support this view of the law. The principle is nowhere better stated than in McCrary on Elections (3 Ed.), sec. 190:

"If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statutes must so hold, whether the particular act in question goes to the merits or affects the result of the election or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the Legislature. But if, as in most cases, the statute simply provides that certain acts or things shall be done within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the merits of the election." This statement of the law was approved by us in *S. v. Spires,* 152 N. C., 4. See, also, *Deberry v. Nicholson,* 102 N. C., 465; *Yountz v. Comrs.,* 151 N. C., 582; *Deloatch v. Rogers,* 86 N. C., 357; *Hendersonville v. Jordan,* 150 N. C., 35; *R. R. v. Comrs.,* 116 N. C., 563; *Claybrook v. Comrs.,* 117 N. C., 458; *Bethea v. Dillon,* 74 S. E., 983; *Newsom v. Earnhart,* 86 N. C., 391; *Swain v. McRae,* 80 N. C., 111.

It was said in *Rodwell v. Rowland,* 137 N. C., 617, that a strict compliance with the formality of notice in the case of an election is not always required, as the authority to hold the same is derived from the law and not from the notice, the latter being intended merely to apprise the voters of the time and place appointed for the election, and the registration as well, and that actual notice will sometimes take the place of formal notice or supply the defect or informality of notice, and will be sufficient to sustain the election, if there has been fair and full opportunity to vote, and the result has not been materially changed by any failure to give notice at all, or the want of notice for the full time required. "There is no presumption against the validity of an election; the presumption, if any at all, is the other way." And it was said sub-

stantially in *Wood v. Oxford,* 97 N. C., 227, and *Riggsbee v. Durham,* 99 N. C., 341, that the formal and official declaration of the result is *prima facie* evidence of its correctness, and the burden is upon him who asserts the contrary, and that the crucial question is, What was the true result, and did a majority of the qualified voters of the town (Durham and Oxford) vote for the schools in the one case or the issue of the railroad bonds in the other? And if this were the case, the alleged irregularity would not defeat or avoid the election. This Court said in *Quinn v. Lattimore,* 120 N. C., 432: "The object of the law—a fair and full expression of the will of the qualified voters—must be kept in mind; and if this has been obtained, and no fraud appears, we will not look for more irregularities to defeat his will." And in *Hampton v. Waldrop,* 104 N. C., 453, where there was an irregularity in the conduct of the registration, it was held that it would not vitiate the election if everything was fairly done and a fair opportunity to vote given, and no one voted whose name did not appear on the registration book and no one voted who was not entitled to vote and no one who was entitled to vote was excluded.

The case of *Swain v. McRae,* 80 N. C., 111, is quite pertinent. It appeared there that a registration was ordered, but not had for the reason that the order was made within less than thirty days of the time required by the statute for opening the books, though there were forty-five days between the date of the order and the day of the election, and the court held that the result should stand as if there had been a formal compliance with the law in all other respects, because the informality would not be regarded as material if there had been a sufficient opportunity to register and vote and the statute was substantially, though not strictly, complied with. See *Tyson v. Salisbury,* 151 N. C., 469.

We held in *Yount v. Comrs., supra:* "When it has been found as a fact by the lower court that every qualified voter has had a fair and ample opportunity to register, an election declaring for a special school tax would not be held invalid by reason of the fact that the registrar left the district for a part of two days out of the twenty days required for registration. And irregularity in the conduct of an election which does not deprive a voter of his rights or admit a disqualified voter to vote, which casts no uncertainty on the result, and which was not caused by the agency of one seeking to derive a benefit from the result of the election, will be overlooked when the only question is which vote was greatest. The same principles are applicable to the rules regulating the registration of electors."

As to the necessity for a strict compliance with the law in respect to registration, it is said by a careful text-writer: "The registration laws are chiefly for the purpose of allowing a fair exercise of the elective

franchise, and a strict compliance with all their provisions is not, as a general rule, necessary to the validity of the election, provided the result of the election expresses the will of the majority of the qualified electors. Where a strict compliance with the terms of the registry law by the election officers is not essential to preserve the purity of the election, the votes of electors should not be rejected because of, nor will the validity of the election be affected by, irregularities, unless they are such as to affect the result." 10 A. and E. Enc. (2 ed.), p. 618, citing, among other cases, *Deberry v. Nicholson, supra,* and *Newsom v. Earnhart, supra.* And as to lack of notice, he says: "In the case of special elections, when the law does not fix the time and place of holding the same, but they are to be fixed by some authority, failure to give notice or issue a proclamation of the election will render it a nullity unless the people have actual knowledge and attend, so that the result is not affected. If it appears that the people generally had actual knowledge of a special election, so that the result would not have been different if proper notice had been given, failure to give such notice does not vitiate the election." 10 A. and E. Enc. (2 Ed.), 626. And again: "The failure to give notice for the full time before an election required by statute will not render the election invalid, if there was sufficient notice thereof and a full vote." 10 A. and E. Enc. (2 Ed.), 630.

These principles in the law of elections have passed under the consideration of many courts in other jurisdictions, and the clear, if not decided, weight of authority favors the view we have taken. *S. v. Carroll,* 17 R. I., 591; *Ellis v. Karl,* 7 Neb., 381; *Dishon v. Smith,* 10 Iowa, 212; *S. v. School District,* 13 Neb., 466; *S. v. Lansing,* 46 *ibid.,* 514; *People v. Avery.* 102 Mich., 572; *S. v. Doherty,* 16 Wash., 382; *Demarie v. Johnson,* 50 N. E., 376; *Young v. Comrs.,* 14 Bush (Ky.), 161; *Woodward v. Fruitvale Sanitary Dist.,* 99 Cal., 554; *Seymour v. Tacoma,* 6 Wash., 427; *Athlone case,* Bar. and Am. Elec. Cases, 115.

A substantial compliance with the requirement is sufficient. 10 A. and E. Enc., 632; *Ch. R. R. Co. v. Pinckney,* 74 Ill., 277; *People v. Sisson,* 98 Ill., 335; *West v. Whitaker,* 37 Iowa, 598; 10 A. and E. Enc., 766; *Datz v. Cleveland,* 7 L. R. A., 431; *Adsit v. Secretary,* 11 *ibid.,* 534; *Moyer v. Vandevanter,* 29 *ibid.,* 670, and *S. v. Lansing,* 35 L. R. A., 124.

In *Demarie v. Johnson,* 50 N. E., 376, it was held that a strict compliance was not necessary, and that a failure to comply with the provisions for giving notice did not render an election void, where it did not appear that the irregularity prevented such a number of electors from voting as would change the result. And in *Ellis v. Karl, supra,* the Court decided that where the result of the election would not have been different if proper notice had been given, the election would not be set aside at the suit of persons who had participated in it, as plaintiff in this case had done.

The ultimate conclusion from the authorities is thus stated in 10 A. and E. Enc. (2 Ed.), at pp. 755, 767: The general principles to be drawn from the authorities are, that honest mistakes or mere omissions on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not avoid an election, unless they affect the result, or at least render it uncertain. But if the irregularities are so great that the election is not conducted in accordance with law, either in form or substance, and there are matters of substance that render the result uncertain, or where they are fraudulent and the result is made doubtful thereby, the returns should be set aside.

But in *Perry v. Whitaker,* 71 N. C., 475, there is a strong intimation of the Court that an election held in the manner of this one should not be disturbed. *Justice Reade* there said: "In our case, no registration books were opened at all. This might not have worked any wrong, if every person otherwise qualified had been allowed to vote without regard to registration." If that be so, we do not see why an election held with registration books, and where there was fair opportunity to register and vote, and there is no fraud or suppression of votes or exclusion of proper votes, should not be considered as valid and binding upon the city and as giving authority to issue the bonds.

The case of *Briggs v. Raleigh,* 166 N. C., 149, 153, is, perhaps, more nearly analogous to the case at bar than any other. *Justice Brown* there said: "It is further contended that fifteen days notice of the new registration was not given. Yet it appears from the findings of the court that the electors of the city of Raleigh had actual knowledge of the registration, and that a very large majority of the electors did register and vote. Notice of the election and registration was published in the *Raleigh Times* and in the *News and Observer* for thirty days; and the court further finds that no citizen of Raleigh was denied the privilege of registering, but every qualified voter in the said city had ample opportunity to register, and that a very large majority of the newly qualified electors did register." The court below found no facts, but we are permitted to find them, and, as they appear to us, this election was more regularly conducted from its inception to the close of the polls and the declaration of the result than was the one in *Briggs' case.* If the voters of Durham did not acquire actual knowledge of the time of registration and election after so much agitation of the question, daily advertising, and a strenuous campaign by able and active factional leaders, a formal notice for the time required by the law would not have been apt to impart it. In that case (*Briggs v. Raleigh*) there was a failure to give the requisite notice of registration, and with respect to an objection based upon this fact, the Court, after using the foregoing language, quotes with full approval what was said about a similar objection in *Deberry v. Nicholson,*

supra, namely: "Statutes prescribing rules for conducting popular elections are designed chiefly for the purpose of affording an opportunity for the free and fair exercise of the right to vote. Such rules are directory, not jurisdictional or imperative. Only the forms which affect the merits are essential to the validity of an election or the registration of an elector"; and adds these significant words: "An irregularity in the conduct of an election which does not deprive a voter of his rights or admit a disqualified person to vote, which casts no uncertainty on the result, and which was not caused by the agency of one seeking to derive a benefit from the result of the election will be overlooked when the only question is which vote was greatest. The same principles are applicable to the rules regulating the registration of electors." And then, quoting from McCrary on Elections, secs. 187 to 190, inclusive, the proposition is laid down: "If, as in most cases, the statute simply provides that certain acts or things shall be done within a particular time or in a particular manner, and does not declare that this performance is essential to the validity of the elections, then they will be regarded as mandatory if they do, and directory if they do not, affect the merits of the election."

Let us now apply more directly to the facts, as they appear in this record, the rule of law thus formulated. It is quite manifest that no qualified voter was denied, or deprived of, the right or opportunity to register and vote in this election. The vote actually cast was the second largest vote ever polled in a city election and certainly up to that date, and the registration list appears to have been the second largest, or at least the third, ever compiled for an election. There is no suggestion that any person, designated by name or otherwise, was deprived of the chance to register and vote. The election was in every respect fairly and honestly conducted. Two parties seem to have been arrayed against each other, and earnestly and with searching activity and zeal gathered in the voters from every precinct, scouring all quarters within the boundaries of the city, so that no one would be left out. The rivalry between them, though apparently quite friendly, was none the less decidedly energetic, and the contest for votes was warm in the beginning and grew in intensity as the campaign progressed. It is not likely that any voter was overlooked or lacked opportunity, or *importunity,* to qualify himself and cast his vote. If any such there were, we find no evidence of the fact in this record. We, therefore, take it that the vote cast at the election represented a clear majority of the qualified voters of this city, and that any irregularity in regard to notice of registration did not materially affect the result, which would, in fact, have been the same had full notice been given. It is true that there was a new charter election a year or so afterwards at which the qualified voters numbered 1,448, and a party primary in April, 1915, for the nomination of a mayor and board

of aldermen, when there were 2,400 registered, but these matters are too remote and intangible, and involved too much in conjecture, and without proper and adequate explanation as to the cause of the increase, to overturn an election when it is perfectly evident that the people were fairly and fully heard upon this vital question in the management of their municipal affairs. If those lists had been purged of any illegal registrations, and consideration given to the additions to the lists on account of voters who had, since April, 1914, become qualified by arrival at full age or otherwise, we could better determine what weight they should have in the estimate. There was an easier way of ascertaining if any person had failed to register and vote because the notice was not given for the full time, and in the absence of this kind of proof we would hesitate long before accepting the other as sufficient to overcome the conviction as to the true facts produced by the evidence as to the substantial regularity of the election and the reliability of the result.

It is suggested that the eight days allowed for registration were not sufficient; but where is the evidence of it in the record? The case shows that there was a fair, full, and free election of which the people of Durham had notice for the full period of thirty days prescribed by the law, and in that notice, and for the same length of time, they were also notified that there would be a new registration of voters, and by some sort of inadvertence, which not unusually happens, though it should not, the officers in charge of the election kept the books open for only eight days. The evidence is really conclusive, when properly analyzed, that every man who was entitled to register and vote did so, and that the result would not have been different if the full time of twenty days had been allowed. It is not contended, as we understand, that a failure to keep the books open for the full time would necessarily vitiate the election, for such a contention would be in direct conflict with our former decisions, and this being so, how much less than the full time would invalidate the result? Where will we draw the line? The safest way is to follow the principle heretofore declared, and reiterated, that the test is whether the deviation from the provisions of the law have materially affected the result or rendered it uncertain. What *Justice Merrimon* said in *Smith v. Wilmington*, 98 N. C., 349, was a general dissertation upon the necessity of a compliance with the law by the election officers, and in that case the Court does not even intimate that noncompliance will render the election void, unless it has essentially affected the result by excluding persons qualified to register and vote. The same justice said, at the very next term of this Court, in *Riggsbee v. Durham*, 99 N. C., 349, 350, where irregularities were said to have occurred: "These allegations, in a case like this, are too general and indefinite. The plaintiff should have alleged specifically and particularly the ground of com-

plaint against the validity or sufficiency of the election. If he intended to say that qualified voters were denied the right to vote, he should have named them and stated the number of them." The justice then goes on to say that "If the irregularities suggested by plaintiffs did in fact exist, they could not render void or defeat the election"; the question, at last, being, "What was the true result? Did a majority of the qualified voters of Durham vote for schools? This was the material inquiry to be considered and determined *de novo,* and finally, by the court." And to the same effect is *R. R. v. Comrs.,* 116 N. C., 563, 568, where the Court uses this strong and significant language: "We think the object of all elections is to ascertain, fairly and truthfully, the will of the people—the qualified voters. That registration, notice of elections, poll-holders, judges, etc., are all parts of the machinery provided by the law to aid in attaining the main object—the will of the voters, and should not be used to defeat the object which they were intended to aid. This being so, it is held that a substantial compliance with the provisions of the statute under which the election is held is sufficient." *Chief Justice Smith* said in *Smith v. Wilmington, supra,* at p. 354: "All have had an opportunity to register and thus secure the right to vote on the pending proposal, and if they failed to do so it is their own fault, and must be regarded as an acquiescence in the result."

There was not even an attempt made to point out a single individual who desired to vote and failed to do so because of the irregularity in the registration. On the contrary, it is perfectly apparent that there was none such, and that the registration and the vote cast at this election were almost unprecedented in their volume. The vote at a party primary the year afterwards furnishes no tangible proof that should discredit this election. As *Justice Merrimon* said, the plaintiff should have named the voters who, if registered, would have changed the result. It will not do to make general charges. They must be specific and backed by proof to substantiate them.

The object of the law has been fully attained. The people of Durham have asked for the privilege of constructing a water plant as necessary to their health and comfort, and have expressed in unmistakable terms their willingness to pay for it by taxation, and we see no valid reason why the popular will, so emphatically pronounced, should not be heeded. This is not like a case where the people have not been heard upon the important questions of taxation, when we should see that their rights are thoroughly safeguarded, and exact a strict compliance with the law.

We must declare this election to be valid, or overrule *Briggs v. Raleigh, supra,* and a long line of decisions in this Court, and disregard the overwhelming weight of authority in other jurisdictions. Extracts taken from a general discussion of the question as to the duty of officers to

comply with the law should be read with the context, and, as thus considered, they are in perfect harmony with our view of this election. As said by *Justice Merrimon* in *Van Amringe v. Taylor,* 108 N. C., 198, the irregularities must affect "the substance."

We have not discussed the interesting question raised by counsel, as to which law applies to the registration and election, as we have assumed, for the sake of the argument only, that the longer notice was required—that is, twenty days before the opening of the books for the registration of voters. As to which law does apply, we do not decide.

The order and judgment of the court below is reversed and the injunction will be dissolved, it being declared that the city authorities of Durham have the power, confirmed by a vote of the people properly taken, to issue the bonds and to provide for the payment of the principal and interest thereof as the law directs.

Reversed.

ALLEN, J., dissenting: The authorities in this State go very far in sustaining elections when there is no evidence of fraud, and properly so, but it has not yet been held that an election is valid when a new registration has been ordered and no notice of the registration has been published, and when full opportunity has not been given to all electors to register.

As said by *Associate Justice Walker,* in the opinion of the Court, "The law does not provide for notices of an election and the registration of voters, a preliminary thereto, as mere idle ceremonies, to be given or not as may suit the whims or convenience of those who have the calling and conduct of the election and its machinery in charge, but it is intended to be a serious and important part of the procedure under which the election is called and held, and is not to be neglected or omitted, under any circumstances, by those to whom has been intrusted the duty of complying with the law. It has always to be considered as an essential to a regular election, and not as a mere nonessential which will have no weight with the courts as to the validity of an election, for the contrary is true."

Speaking to the same point, and discussing the necessity of complying with the law as to registration, *Chief Justice Merrimon* said in *Smith v. Wilmington,* 98 N. C., 349: "To render it effectual—to make it serve the purpose of the law—it must be made by the proper officers, in the way and manner and at the times prescribed by law. The statutory regulations in such respects are not simply directory; they are in their *substance mandatory* as well; they do not simply imply discretion in those authorities charged with the execution of them, and, moreover, to allow the exercise of such discretion in respect to a matter essential, affecting the rights of individuals and the public of great moment,

might—would, no doubt, oftentimes—lead to private and public wrong, and serious confusion"; and again, in *Van Amringe v. Taylor,* 108 N. C., 198: "The ascertainment of the popular will or desire of the electors under the mere semblance of an election unauthorized by law is wholly without legal force or effect, because such election has no legal sanction. In settled, well regulated government the voice of the electors must be expressed and ascertained in an orderly way prescribed by law. It is this that gives order, certainty, integrity of character, dignity, direction, and authority of government to the expression of the popular will. An election without the sanction of the law expresses simply the voice of disorder, confusion, and revolution, however honestly expressed. Government cannot take notice of such voice until it shall in some lawful way take on the quality and character of lawful authority. This is essential to the integrity and authority of government. An essential element of a valid election is that it shall be held by lawful authority, substantially as prescribed by law. It is not sufficient that it be conducted honestly; it must as well have legal sanction. The statutory provisions and regulations in respect to public elections in this State must be observed and prevail, certainly in their substance. Otherwise, the election will be void, and so treated. Therefore, the contention that if the election in question was simply conducted fairly and honestly it was valid, is unfounded."

These decisions are not in conflict with the North Carolina cases commented on in the opinion of the Court, and all may be reconciled upon the ground that while the courts will not set aside elections because of slight deviations from statutory requirements, which have not affected the result, the directions of the statute must be *substantially* complied with or the election will have no legal effect; and if this is the law, I do not think a notice of a new registration published for fifteen days is a substantial compliance with a statute requiring it to be published thirty days, or that keeping the registration books open for eight days is a substantial compliance with a statute requiring twenty days; and that is the case before us.

The importance of compelling obedience to the restrictions imposed by the General Assembly is growing each year. The luxuries of one age become the necessities of the next, and no one can foresee what may be included in the class of expenses called necessaries within the near future. The tendency towards large bond issues for public improvements is also increasing, and the bond issue in this case amounts to one-half million of dollars. Only a few years ago it was held by this Court that debts created for sewerage, for waterworks, and for electric lights were not for necessary expenses, and that they must be approved by the people at the polls; but these decisions have been reversed, and now the gov-

erning authorities of a city may issue bonds in large amounts for these purposes without consulting the people who have to pay them.

The only safeguard left is that, although the debt is for necessaries, the General Assembly may require an election to be held, and may prescribe the rules and regulations for conducting it; and I do not think it wise to destroy or minimize this protection.

A different question might be presented if the bonds had been issued and were in the hands of innocent holders, but no harm can come when, as in this case, no rights have accrued, in requiring the question of issuing the bonds to be again submitted to the people at an election held according to law.

If eight days is a substantial compliance with a statute requiring twenty, where shall we stop? Will it be held that five days, or three days, or no days at all are sufficient? Has not the elector who is opposed to a bond issue the right to rely upon the law and to refuse to participate in an election illegally held?

HOKE, J., concurs in the dissenting opinion.

T. M. BLAND v. INTERNATIONAL HARVESTER COMPANY.

(Filed 29 September, 1915.)

1. Contracts, Written—Parol Evidence.

A contract that the law does not require to be in writing may partly be in writing and partly rest by parol, but parol evidence is not permissible to vary or contradict the written part.

2. Contracts—Vendor and Purchaser—Warranty—Principal and Agent.

A written contract or sale of a thresher and engine, containing the warranty that they are well made, of good material, and durable with proper care, and that representations made by any one as an inducement of purchase will not be binding upon the vendor, does not by its terms or implication extend the warranty to include that the engine will successfully operate plows; and any verbal representations made by the seller's agent at the time, or thereafter, without the ratification of the principal, are incompetent as evidence.

3. Contracts—Warranty—Conditions—Compliance.

Where a sale of merchandise is made under a certain warranty, specifying that the purchaser shall give the goods three days trial, and should they fail to fulfill the warranty, written notice shall be given at once to the seller or his agent, it is the duty of the purchaser to give the required notice within a reasonable time in the event of a breach of warranty.

4. Contracts—Warranty Implied—Value.

In an action for breach of warranty of the goods sold, the principle that there is an implied warranty that the goods shall be of some value has no application when it appears that the purchaser uses them for the purposes for which he purchased them. *Furniture Co. v. Mfg. Co.*, *ante*, 41, cited and distinguished.

BLAND *v.* HARVESTER CO.

APPEAL by plaintiff from a judgment of nonsuit by *Bond, J.*, at May Term, 1915, of CHATHAM.

A. C. Ray and A. A. F. Seawell for plaintiff.
R. H. Hayes, H. A. London, and F. W. Bynum for defendant.

CLARK, C. J. There is no allegation in the complaint of mutual mistake, or of fraud on the part of the defendant. The plaintiff relies upon certain verbal warranties which he alleges were made by the sales agent of the defendant, and not upon breach of any of the warranties in the written contract set out in the record, marked Exhibit I. This contract was put in evidence by the plaintiff himself.

This printed contract in large letters has at its head these words: "Order for thresher, attachments, engine." Nothing is said therein, either in the headline or in the body of the contract, as to the engine being used for plowing. The warranty therein is, "Said thresher, attachments, and engine to be well made, of good material, and durable with proper care, and to do good work if properly operated by competent persons with sufficient power, and the printed rules and directions of the manufacturer are intelligently followed." The plaintiff testified that he was satisfied with the engine so far as threshing was concerned, and that he still has the engine and has been using it for various purposes. His only complaint is that plowing cannot be satisfactorily done with the plows used by him, which he did not buy from the defendant, but from the Avery Company.

The printed contract says: "No representation made by any person as an inducement to give and execute within order shall bind the company." The plaintiff relies entirely upon certain alleged verbal representations made to him by a sales agent of the defendant. In a late case this Court said that parties to the contract are "not only held to the terms of the contract deliberately entered into, but are not permitted to contradict or vary its terms by parol evidence, as the 'written word abides' and must be considered as the only standard by which to measure the obligation of the respective parties to the agreement, in the absence of fraud or mistake." *Guano Co. v. Live-stock Co.*, 168 N. C., 447, and cases there cited.

In *Piano Co. v. Strickland*, 163 N. C., 251, the Court also said: "There was no evidence of authority upon the part of the agent to waive the provisions of the contract and to make the oral agreement."

The plaintiff in this case did not offer to return the engine or any part thereof, as required in the printed contract, but still has it and is using it for various purposes. If the engine did not come up to the warranty in the printed contract, it was the duty of the plaintiff to return it or

tender its return to the defendant within a reasonable time. *Parker v. Fenwick*, 138 N. C., 209; *Mfg. Co. v. Lumber Co.*, 159 N. C., 508.

The stipulation in the printed contract is as follows: "If, after three days trial by the purchaser, said property shall fail to fulfill the warranty, written notice thereof shall at once be given to the said company at the Harvester Building, Chicago, Ill., and also to the agent through whom the same was purchased, stating therein wherein it failed to fulfill the warranty." The plaintiff admits that no written notice was given either to the company at Chicago or to the agent through whom he bought, and that such agent told him at the time of the purchase that the company would sell "only by their regular printed contract," and thereafter another agent came to him and presented the written contract, which he signed. The conversation with another agent of the defendant which he alleges as a waiver occurred, according to his evidence, after he had signed the printed contract and after the engine had arrived, and there is no evidence tending to show that such agent had authority to waive the terms of the printed contract already signed nor that such statement was reported to the company and ratified by it.

The court correctly told the jury, "Since the contract was received by the defendant and the property shipped in obedience thereto, the contract was complete, and no conversation or statement made by any agent of the company after that date could be heard to contradict or vary in any way the terms of the written contract, as the printed contract specially provides." The purpose of a traction engine is to generate and furnish power. How that power is to be applied is a different matter. On the face of this contract it was contemplated that it should be used for threshing, and the plaintiff admits that it was satisfactory for that purpose. The defendant did not furnish plows nor contract that the tractor should do plowing. Whether it should be satisfactory for that purpose must depend largely upon the nature of the plows used and the method adopted for their use. This was not within the terms of the contract, and there being no allegation or proof of fraud or mistake, the court properly directed a nonsuit. *Furniture Co. v. Mfg. Co.*, *ante*, 41, is not in point, because the engine is not devoid of value, but, on the contrary, useful for threshing and other purposes, and is still in use by the plaintiff.

It is true that when a contract is not required to be in writing, and is only partly in writing and partly verbal, the latter part can be shown by parol evidence. *Nissen v. Mining Co.*, 104 N. C., 309. But this principle does not justify contradicting the part in writing by oral testimony, nor does it authorize verbal agreement by agents when such additional agreements are forbidden by the written contract and the agent is not shown to have authority, either specially or by the nature of his employment as a general agent (*Gwaltney v. Assurance Society*, 132 N. C., 925;

s. c., 134 N. C., 552), to alter or vary it, and there is no proof that the modification of the contract by the agent was reported to the company and ratified.

The judgment of nonsuit is

Affirmed.

LOULA M. RILEY v. W. H. STONE, JR.

(Filed 29 September, 1915.)

1. Court's Discretion—Verdict Set Aside.

The discretionary power of the Superior Court judge to set aside a verdict of the jury is not reviewable on appeal, in the absence of his abuse of this discretion.

2. Trials—Verdict—Nonsuit—Court's Discretion—Power of Courts—Interpretation of Statutes.

A motion to dismiss an action after verdict can only be granted for lack of jurisdiction or that the complaint did not state a cause of action; and the authority of the court to grant an involuntary nonsuit, upon motion made after the plaintiff has introduced his evidence and renewed after the defendant's evidence is in, resting entirely by statute, Revisal, sec. 539, the trial court is without authority, after verdict, to further consider the defendant's motion for nonsuit, made under the statute, and allow it.

3. Court's Discretion—New Trial—Verdict—Nonsuit.

An order of the court setting aside a verdict in his discretion upon motion that it is against the weight of evidence is in conflict with his further sustaining a motion to nonsuit the plaintiff upon the evidence, Revisal, sec. 539; for in the latter instance he necessarily acts upon the ground that there is no evidence, and where the verdict has been set aside in the court's discretion, and a nonsuit granted after verdict, the latter is erroneous, and the cause will stand for a new trial.

WALKER, J., concurs in result; HOKE, J., dissents.

APPEAL by plaintiff from *Bond, J.*, at June Term, 1915, of CHATHAM.

John A. Barringer, R. C. Strudwick, and Fred W. Bynum for plaintiff.

R. H. Hayes, Siler & Milliken, and Brooks, Sapp & Williams for defendant.

CLARK, C. J. This is an appeal from a judgment of involuntary nonsuit entered after verdict in favor of the plaintiff. The court entries made during the progress of the trial are: "At close of plaintiff's testimony the defendant moves for judgment as of nonsuit. Motion denied, and defendant excepts. . . . At the close of all the testimony the defendant again renewed his motion to nonsuit the plaintiff, and repeats the same in respect to each of plaintiff's several causes of action. The court overruled each of the motions, and the defendant excepted to the

order of the court in each instance." The case was argued to the jury, and the court charged them as to the law. The jury brought in a verdict answering all the issues in favor of the plaintiff. The record then is: "The defendant moved the court to set aside the verdict in the exercise of his discretion, being contrary to the evidence and against the weight of the testimony. After argument of counsel upon the motion, the court allowed the same to set aside the verdict. The defendant then renewed his motion made at the close of all the testimony to nonsuit the plaintiff and dismiss her action, which motion the court granted, and the plaintiff excepted and appealed."

The action of the court in setting aside the verdict in the exercise of his discretion is irreviewable, and the case stands for a new trial. The further action of the court in attempting to grant a nonsuit after the verdict was set aside is unauthorized by the former practice or the statute, and void. After verdict the action could be dismissed upon the ground only of (1) lack of jurisdiction or (2) that the complaint did not state a cause of action. The motion was not made and could not be sustained on either of these grounds. It was made and granted on the ground that there was no evidence sufficient to carry the case to the jury. This is contrary to the judgment already entered, that the verdict was against the weight of the evidence.

The power of the Superior Court to grant an involuntary nonsuit is altogether statutory, and did not exist prior to the Hinsdale Act of 1897, now Revisal, 539.

In *Stith v. Lookabill*, 71 N. C., 25, *Pearson, C. J.*, held: "A motion to nonsuit a plaintiff in the midst of a trial on the ground that his evidence does not make out a case, the defendant's counsel at the time stating that 'If his Honor should overrule the motion, he had evidence to offer showing title in itself,' is an unfair and loose mode of practice, and should not be tolerated." *Chief Justice Pearson* said: "By a demurrer to the evidence the defendant puts the case, which means the *exitus*, issue, or end of the case, upon sufficiency of the evidence. The judgment of the court then decides the action one way or the other. But by this novel practice the defendant has two chances to one, which is not 'fair play.'"

This was the well settled procedure up to that time, which *Chief Justice Pearson* further said had not been in any wise changed by the new code of procedure.

The act of 1897, ch. 109, as amended by ch. 131, Laws 1899, and ch. 594, Laws 1901, is now formulated in Revisal, 539, and reads:

"*Demurrer to evidence.* When on trial of an issue of fact in a civil action, or special proceeding, the plaintiff shall have produced his evidence and rested his case, the defendant may move to dismiss the action, or for judgment as in case of nonsuit. If the motion is allowed, the plaintiff may except and appeal to the Supreme Court. If the motion is

refused, the defendant may except, and if the defendant introduces no evidence, the jury shall pass upon the issues in the action, and the defendant shall have the benefit of his exception on appeal to the Supreme Court. But after the motion is refused he may waive his exception and then introduce his evidence, just as if he had not made the motion. But he may again move to dismiss after all the evidence on both sides is in. If the motion is then refused, upon consideration of all the evidence, he may except, and after the jury shall have rendered its verdict he shall have the benefit of such latter exception on appeal to the Supreme Court."

It was held that this statute did not apply to criminal cases (*S. v. Houston,* 155 N. C., 432), as to which the former procedure still obtained. Thereupon the Legislature enacted ch. 73, Laws 1913, extending the statute (Revisal, 539) to criminal cases, and ch. 32, Special Session 1913, extended the latter statute to all criminal courts; but it was not in the power of the judge below to further amend the statute himself, so as to enter a judgment of nonsuit after he had set aside the verdict. Indeed, Revisal, 539, provides that when the defendant moves for nonsuit at the close of all the evidence, after it has been refused at the close of plaintiff's evidence, he shall have the benefit of such latter exception, "after the jury shall have rendered its verdict," on appeal to the Supreme Court. This is the limit of the privilege extended to him by virtue of the change in the practice made by the act, now Revisal, 539, and recognized the rights of the plaintiff.

It is true that the judgment in this case slightly differs from the record entries above set out, which were made during the course of the trial, by saying "at the close of plaintiff's evidence and close of all the evidence, defendant having made and renewed motion for judgment as of nonsuit, which the court at that time refused to pass upon, and to which defendant excepted; and the court having set aside the verdict in its discretion because the court was of opinion that said verdict was contrary to and against the weight of the evidence, and defendant having thereupon asked the ruling of the court upon his motion for judgment as of nonsuit, upon consideration of which the court, being of opinion that the presumption of absence of malice raised by the qualified privilege which attended the speaking of the alleged words had not been rebutted by any proof of expressed malice, and the court being further of the opinion, as to the second and third causes of action alleged in the complaint, that there was no evidence to show any unlawful imprisonment or restraint of the plaintiff or any assault upon her, "he thereupon entered judgment as of nonsuit." This action of the court is without any precedent in the former practice, and is unwarranted by the extended power of nonsuit conferred upon the court by Revisal, 539, which conferred such power to make such motion at the close of the evidence, at which time the court

must refuse or grant it. The practice inaugurated by the court *ex mero motu* in this case would be manifestly unjust to all plaintiffs. Notwithstanding the verdict is set aside, the plaintiff on another trial might again win the verdict, and, if so, would recover all costs, including those of the trial just had, which she could not do if she could be arbitrarily nonsuited by the judge after the verdict is set aside, as a matter of discretion, as in such case a reversal or appeal of the nonsuit would not entitle the plaintiff to judgment on the verdict.

The procedure under section 539 has been well settled by many decisions, and, indeed, the language of the statute is too plain to admit of doubt. The only motion to dismiss which can be made after verdict is either "upon the ground of want of jurisdiction or of failure of complaint to state a cause of action." This may be made at any time, even orally or even in the Supreme Court on appeal. But neither of these objections has been made or could be sustained in this case. An exception for failure to charge that there is not sufficient evidence can only be taken before verdict. *S. v. Harris,* 120 N. C., 577, and cases cited.

The motion to dismiss because there is not sufficient evidence to submit the case to the jury when made under the former practice cut off the further introduction of evidence. The statute extended the time for a renewal of the motion to the close of all the evidence. The judge had no power to extend it by amending the statute so as to permit the motion to be made a *third* time under the guise of "renewed the motion" after verdict. His decision, twice made, that there was evidence to go to the jury, was final upon that point, subject to exception made and entered at the time. Indeed, the first exception is "waived," the statute says, by the defendant if he introduces testimony. *Parker v. Express Co.*, 132 N. C., 129; *Strause v. Sawyer*, 133 N. C., 64. In this latter case the Court held that the plaintiff could not take a nonsuit after verdict where the jury had returned to their room to make a merely formal correction in the verdict.

An involuntary nonsuit in favor of the defendant is the counterpart, under the statute as it now stands, of a voluntary nonsuit by the plaintiff. The plaintiff not being able to take a nonsuit after verdict, the defendant cannot obtain such order, except as a matter of law, which is not possible after the verdict has been set aside as a matter of discretion. The court having set aside the verdict in his irreviewable discretion, the case stands for a new trial. The defendant not having appealed, it is not necessary for us to pass upon the sufficiency of the testimony. But it is proper to say, as the case is to be tried again, that upon the evidence as it appears in this record the majority of the Court is of opinion that there was sufficient evidence to justify submitting the case to the jury. We will not discuss the evidence, as it might prejudice one or other of the parties in a new trial, and, besides, on the next trial the evidence

may be materially different and weaker or stronger for one or both of the parties.

There is no appeal, of course, from the judgment setting aside the verdict, but the action of the court in granting a nonsuit after verdict had been set aside is

Reversed.

WALKER, J., concurs in result; HOKE, J., dissents.

BRINSON & KRAMER v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 29 September, 1915.)

1. Interstate Commerce—Statutes—Carmack Act—Water Transportation—Damages—Constitutional Law.

The Carmack amendment to the Interstate Commerce Act, 34 St. at Large, 594, is constitutional and valid, and in case of shipments coming within its terms, the initial carrier is made responsible for any "loss, damages, or injury to the goods carried by it or by any common carrier, railroad or transportation company," not as absolute insurers, but to be fixed and determined according to the principles of general law applicable to common carriers as modified by statutes relevant to the subject.

2. Interstate Commerce—Water Transportation—Connecting Carriers—Federal Statutes—Limiting Liability—Defenses.

Where a railroad company receives an interstate shipment of freight, without designation as to route, and any carrier along the usual route of shipment is a carrier by water, and loss or damage occurs by wrong of the latter company, the initial carrier may avail itself of Federal legislation applicable to transportation companies of that character, limiting the quantum of recovery in certain instances, and at times relieving of responsibility, upon the principle that the initial carrier, so far as the shipper is concerned, is held liable for through transportation, and, being liable for the default of the connecting carrier, may avail itself of any defenses or liabilities open to the latter.

3. Interstate Commerce—Federal Statutes—Water Transportation—Connecting Carriers—State Courts—Jurisdiction.

Where an initial carrier of an interstate shipment of goods requiring transportation by water along a usual route to its destination is sued in the State court for damages arising while in the possession and control of the connecting carrier by water, the defenses available under the Federal statutes (U. S. Compiled Statutes, secs. 4289, 4283) may be made available in a State court having cognizance and jurisdiction of the cause of action.

4. Interstate Commerce—Water Transportation—Federal Statutes—Limiting Liability—Negligence—Utmost Care.

Where the owner of a vessel sets up the Federal statutes limiting his liability, the burden is upon him to show, in order for him to avail himself of the protection afforded by them, that he has provided the vessel with a competent master and competent crew, and that the ship, when she sailed, was in all respects seaworthy; that he therein exercised such utmost care as the most prudent and careful men exercise in their own matters under similar circumstances. 3 U. S. Compiled Statutes, secs. 4289, 4283.

5. Interstate Commerce—Federal Statutes—Water Transportation—Negligence—Prima Facie Case—Burden of Proof.

Where it is shown that a railroad company has accepted goods for interstate shipment and that they have not been delivered to the consignee, a *prima facie* case of negligence is established both under the State and Federal laws; and where the railroad seeks the benefit of the Federal statutes limiting liability where the damages sought have occurred while in the course of transportation by a connecting water company, the burden of proof is on the defendant to show such facts as will bring it within the provisions of such statutes; and upon its failure to introduce evidence in this respect, the right will be denied.

APPEAL by plaintiff from *Justice, J.*, at February Term, 1914, of BEAUFORT.

Civil action on appeal from a justice's court and tried on case agreed.

The facts in the case agreed are as follows:

"In this cause it is agreed that the following facts shall be found by the court, and that judgment shall be rendered thereon as the court may determine the law therefrom.

"It is agreed and found as a fact that the plaintiffs delivered to the defendant on 26 January, 1914, seventeen crates of eggs, which were consigned to C. M. Bitten & Co., New York City; that the shipment was made from Belhaven, North Carolina, the point of origin, to Norfolk, Va., over the lines of defendant Norfolk Southern Railroad, and that it was there delivered, in due course of transportation, by the Norfolk Southern Railroad in good order to the Old Dominion Steamship Company on 29 January, 1914; that the Old Dominion Steamship Company accepted said shipment for transportation from Norfolk to the consignee in New York; that the value of said shipment was $140.59; that the Old Dominion Steamship Company, a corporation, operating sea-going vessels from Norfolk to New York and other ports, placed said shipment on its steamer *Monroe*, which sailed from Norfolk bound to New York on 29 January, 1914; that on 29 January, or 30 January, 1914, a collision occurred at sea between the steamship *Nantucket*, of the Merchants and Miners Transportation Company, and the steamship *Monroe;* that said steamship *Monroe*, with all of its freight, was lost by reason of said collision.

"It is further found as a fact that in the proceedings in admiralty against the *Nantucket*, pending in the District Court of the United States for the Southern District of New York, a large number of claims have been filed libeling the *Nantucket* on account of said collision, and that these claims exceed the value of the *Nantucket* by about three times her value. That on 17 February, 1914, the consignees were notified that this shipment had been lost in the collision which had occurred on the high seas between the *Nantucket* and *Monroe*.

"It is further agreed that if upon the foregoing findings of fact, the court should be of the opinion that plaintiff is entitled to recover, then

plaintiff shall recover the amount claimed by him, but that if the court should be of the opinion that no liability attached to the defendant Norfolk Southern Railroad, then judgment of nonsuit shall be entered."

Upon these facts, the court, being of opinion that "no liability attached to the defendant company," gave judgment that defendants go without day, and plaintiff excepted and appealed.

Tooly & McMullan for plaintiff.
Small, MacLean, Bragaw & Rodman for defendant.

HOKE, J., after stating the case: The amendment to the Interstate Commerce Act, passed by Congress 29 June, 1906, 34 St. at Large, 594, and commonly known as the Carmack amendment, has been several times sustained as a constitutional and valid enactment (*Adams Express Co. v. Croninger,* 226 U. S., 491; *Atlantic Coast Line Ry. v. Riverside Mills,* 219 U. S., 186, etc.), and in these and other decisions construing the law it has been held that, in case of interstate shipments coming within its terms, the initial carrier is made responsible for any "loss, damage, or injury to the goods carried by it or by any common carrier, railroad or transportation company," not as absolute insurer, but to be fixed and determined according to the principles of general law applicable to common carriers and as modified by statutes relevant to the subject. *Express Co. v. Croninger, supra.* And, from a perusal of the language of the statute making the initial carrier responsible for injuries caused by it or by any connecting carrier, and from the provision also contained in the amendment for recoupment by the initial carrier of any other or connecting carrier actually causing the loss, etc., we concur in the view of well considered cases on the subject, that, although the initial carrier may be by rail, if any connecting company along the designated or usual route of shipment, there being no route designated, is a carrier by water, and the loss or injury occurs by the wrong of such company, the initial carrier may avail itself of the Federal legislation applicable to transportation companies of that character, limiting the quantum of recovery in certain instances, and at times relieving of responsibility altogether. The principle being that, in cases coming within the effects of the law, the initial carrier, so far as the shipper is concerned, is held to have contracted for through transportation and is liable for the default of itself or any connecting carrier, and may avail itself of any defenses or of limitations of liability open to the carrier causing the loss. *The Hoffman,* 171 Fed., 455; *Riverside Mills v. R. R.,* 168 Fed., 987; *Lord v. S. S. Co.,* 4 Sawyer, 292; *same case,* 15 Fed. Cases, No. 8506.

On this question, in *Riverside Mills v. R. R.,* it was held: "In an action by the shipper against an initial carrier for loss of goods shipped

in interstate commerce, under amendment to Hepburn Act of 29 June, 1906, the carrier may make any proper defense which can be made in a court of law and which any connecting carrier on the line of which the goods were lost or the injury occurred might make." And, in the case of *Lord v. Goodhall, supra,* it was held, among other things, that "A party using, for the transportation of his goods, an instrument of commerce which is subject to the regulating power of Congress, must use it subject to all the limitations imposed upon its use by Congress." Both of these causes were affirmed, on writ of error, in Supreme Court of the United States; the first in *R. R. v. Riverside Mills, supra,* and the second in *Lord v. Goodhall,* 102 U. S., 541. The deliverance of the higher Court, however, dealt with other, chiefly constitutional, questions, and the precise point we are discussing was not directly presented; but, as stated, from the language of the statute and the fact that recovery over is allowed the initial carrier, and from the reason and justice of the position, we are well assured that the lower Federal courts have taken the correct view, and that in case of loss by sea the initial carrier may avail itself of these Federal statutes where the same properly apply.

In the cases cited by counsel for appellant, *R. R. v. Carl,* 227 U. S., 639, and *R. R. v. Wallace,* 223 U. S., 481, it does not appear that all or any part of the shipment was lost at sea, and there was no occasion to discuss or decide the matter.

The Federal statutes, then, being applicable to shipments of this character, the question recurs whether, on the facts agreed upon, the defendant is in position to avail itself of these provisions in discharge or reduction of the liability that would otherwise attach. These laws, being chapter 5, Laws 1913, classified in United States Compiled Statutes under section 4289, p. 2946, by which the owner of a vessel is relieved of responsibility, under certain conditions, by reason of faulty navigation and other specified causes, and section 4283 of the same volume, by which the liability of the owner is restricted to the "value of his interest in the vessel and its freight then pending, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred without the privity or knowledge of such owner or owners," etc., have been many times construed by the Supreme Court of the United States, and it is very generally recognized that defenses existent by reason of the statutes may be made available in a State court having cognizance and jurisdiction of the cause of action. *R. R. v. Wallace,* 223 U. S., 481; *Riverside Mills v. R. R.,* 168 Fed., 1987, and in reference to the last mentioned section, that on limitation of liability, it is held, in *Norwich v. Transportation Co.,* 118 U. S., 468; *Norwich v. Wright,* 13 Wallace, 104, and other cases, the value of the

vessel must be estimated after the collision, and, in case the vessel is then sunk and no freight earned, there is usually an end of liability on the part of the owners.

It is understood, however, that in order for an owner to avail himself of the protection of these statutes he must have exercised due diligence in supplying a seaworthy vessel, and the burden is on him to show this. This requirement appears in the act of 1893, 3 Compiled Statutes, p. 2496, as construed in *The Sugar Refining Co. v. The Wildcraft,* 201 U. S., 378, and *The Southwark,* 191 U. S., 1, and *The Carib Prince,* 170 U. S., 655, and, in reference to section 4283, it is held correctly, we think, that the failure of the owner to exercise proper diligence in providing a seaworthy vessel will render him privy to the fault, and, if the vessel is lost in consequence, the limitation of liability in this section will not be allowed to prevail, the section only operating where the loss is "without the privity or knowledge of the owner." *Lord v. Steamship Co.,* 4 Sawyer, 292; 7 Cyc., 389.

In the last named case it was held: "The word 'privity' of the owner, used in section 4283 of the Revised Statutes, means some fault or neglect in which the owner of the vessel personally participates; and 'knowledge,' as used, means some personal cognizance, or means of knowledge of which he is bound to avail himself, of a contemplated loss, or of a condition of things likely to produce or contribute to a loss, without adopting appropriate means to prevent it." "The owner is bound to exercise the utmost care in the selection of a competent master and crew, and in providing a vessel in all respects seaworthy; and if, by reason of any neglect or fault in these particulars, a loss occurs, the owner is in privity within the meaning of the statute"; and *Sawyer, J.,* speaking to the position, said: "As used in the statute, the meaning of the words 'privity or knowledge,' evidently, is a personal participation of the owner in some fault or act of negligence causing or contributing to the loss, or some personal knowledge, or means of knowledge of which he is bound to avail himself, of a contemplated loss, or of a condition of things likely to produce or contribute to the loss, without adopting appropriate means to prevent it. There must be some personal concurrence, or some fault or negligence on the part of the owner, himself, or in which he personally participates, to constitute such privity, within the meaning of the act, as will exclude him from the benefit of its provisions (3 Wallace, 153; 113 Mass., 499).

It is the duty of the owner, however, to provide the vessel with a competent master and a competent crew, and to see that the ship, when she sails, is in all respects seaworthy. He is bound to exercise the utmost care in these particulars—such care as the most prudent and careful men exercise in their own matters under similar circumstances; and if, by reason of any fault or neglect in these particulars, a loss occurs, it is with

his privity within the meaning of the act. But the owner, under this act, is not an insurer. If he exercises due care in the selection of the master and crew, and a loss afterwards occurs from their negligence, without any knowledge or other act or concurrence on his part, he is exonerated by the statutes from liability beyond the value of his interest in the ship and the freight pending."

In *The Southwark*, 190 U. S., *supra*, on the proper construction of the Harter Act, as to the obligation of the owner to supply seaworthy vessel, *Day, J.*, delivering the opinion, said: "Section 3 must be read with section 2 to effectuate the purpose of the act, and shows an intention on the part of Congress to relax, in certain respects, the harshness of the previous rules of obligation upon ship owners, provided the owner shall exercise due diligence to make the vessel seaworthy in all respects, in which event neither the vessel nor the owner shall be liable, among other things, for faults of management or for loss from inherent defects, quality, or vice of the things carried." Of this feature of the law it was said by *Mr. Justice Shiras*, delivering the opinion of the Court in the case of *The Irrawaddy*, 171 U. S., 192, 193, *sub nom. Flint v. Christall*, 43 L. Ed., 1132, 18 Sup. Ct. Rep., 833: "Plainly, the main purposes of the act were to relieve the ship owner from liability for latent defects not discoverable by the utmost care and diligence, and, in the event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility for damage or loss resulting from fault or errors in navigation or in the management of the vessel. . . . Although the foundation of the rule that forbade shipowners to contract for exemptions from liability for negligence in their agents or employees was in the decisions of the courts that such contracts were against public policy, it was, nevertheless, competent for Congress to make a change in the standard of duty, and it is plainly the duty of courts to conform in their decisions to the policy so declared." The effect of this law is not to relieve the owner from the general duty of furnishing a seaworthy ship, but to limit his liability, in certain particulars, and upon the condition named in the statute. *The Carib Prince*, 170 U. S., 655, 42 L. Ed., 1181, 18 Sup. Ct. Rep., 753. Before the passage of the act the initial obligation could be limited in certain particulars by special contract not involving negligence of the owner. Since the passage of the act, as to cases coming within its terms, before the owner can have the benefit of the relief provided by section 3 he must have exercised due diligence to provide a seaworthy vessel, capable of performing her intended voyage." And, in *The Wilderaft*, *supra*, opinion by the same judge, it was directly held: "The burden of proving that a vessel was seaworthy at the time of beginning the voyage, or that due diligence had been used to make her so, rests upon the ship owner claiming the benefit of the exemption provided in the Harter Act of 13 February, 1893 (27 Stat. at L., 445, ch.

105, U. S. Comp. Stat. 1901, p. 2946), sec. 3, against errors of management or navigation, whether or not there is any evidence to the contrary."

Applying these principles to the facts as agreed upon, we are of opinion there was error in giving judgment for defendant, for, while these facts show that the steamer *Monroe* was sunk and the vessel and cargo lost, requiring a return of unearned freight, these facts fail to disclose or supply any evidence that the vessel was properly manned or equipped or that the same was seaworthy, within the meaning of the law.

We are not inadvertent to the finding that the *Nantucket,* the other vessel in the collision, had been libeled for amount three times the value of such vessel, but this throws no light on the question of the *Monroe's* liability in the premises. Even if fault is established on the part of the *Nantucket,* we know that it is not infrequently true that both vessels are at fault, and that provision is made for adjusting liability in such cases.

The goods having been delivered to defendant for transportation, and a failure to deliver being admitted, there is a presumption of negligent default, both under State and Federal laws (*R. R. v. Wallace,* 223 U. S., 481; *Harper v. Express Co.,* 144 N. C., 639; *Meredith v. R. R.,* 137 N. C., 478); and defendant, seeking protection under and by virtue of the Federal statutes, being required, in order to maintain such defense, to show affirmatively that the carrier by water, where the loss occurred, had supplied a seaworthy vessel, and there being no proof offered of that fact, it must be held that the position in relief of liability has not been established, and, on the record, there should be judgment for plaintiff.

This will be certified, that judgment be entered in accordance with this opinion.

Reversed.

L. R. S. BARNES, ADMINISTRATOR, v. RACHEL FORT ET AL.

(Filed 29 September, 1915.)

1. Appeal and Error—Interlocutory Orders.

As to whether an appeal will lie from the interlocutory order rendered in this case, *quere.* The Court, however, decides the matter presented. *Best v. Best,* 161 N. C., 513.

2. Judgments—Liens—Limitation of Actions—Successive Executions.

While issuing execution under a judgment rendered in the Superior Court regularly within the intervals of three years prevents the judgment from becoming dormant, and the necessity of applying to the court for special leave to issue execution under Revisal, sec. 620, the lien of the judgment upon the lands of the judgment debtor expires in ten years from its rendition.

3. Same—Death of Judgment Debtor—Administration—Remedy—Procedure—Statutes.

A judgment creditor who has kept his judgment alive by issuing successive executions thereunder may cause execution to issue without leave of court after the expiration of the ten years, but within three years from the issuance of the last execution, though the lien of the judgment has been lost under the statute, and levy on the land or personalty of the judgment debtor; but upon the death of the latter, this right ceases and he must proceed to collect his judgment in the regular course of administration of the decedent's estate as provided by the statute.

4. Judgments—Liens—Limitations of Actions—Executors and Administrators—Pleas.

An administrator may plead the statute of limitations, after the death of the judgment debtor, to the issuance of an execution under a judgment kept alive by successive executions beyond the ten years period, and so may an heir at law, when it is sought to subject lands, which have descended to him, to the payment of debts.

5. Arbitration and Award—Waiver.

Where the parties to a controversy have submitted the matters in dispute to arbitration, an agreement between them, that the controversy be submitted *de novo* to the court, is a waiver of all rights thereunder, and the award will not conclude them.

SPECIAL PROCEEDING, finally heard by *Bond, J.*, at May Term, 1915, of WAYNE.

It appeared that Cæsar Fort, intestate of plaintiff, died on 8 November, 1911, leaving a will and appointing an executor thereof, who failed to qualify, and, thereupon, the plaintiff was duly appointed administrator *c. t. a.* At the time of his death there were two judgments docketed against intestate in favor of Sauls & Ormond, each for $95, one having been rendered on 23 December, 1898, docketed in Superior Court the same day, and the other rendered in the Superior Court on 16 April, 1900. These judgments were assigned for value to J. M. Grantham, and executions regularly issued thereon within each period of three years subsequent to their rendition, the last one on 31 December, 1908.

The judgments were duly presented by the said J. M. Grantham, the assignee of them, to the plaintiff, as claims against his testator's estate, and the administrator, having doubts as to the justness thereof, agreed in writing to refer the same and all matters connected therewith to R. M. Robinson, under Revisal, sec. 92. The administrator pleaded the statute of limitations.

The referee found "that all of the judgments upon which the claim against the administrator is founded are more than ten years old, and were at the time of the death of Cæsar Fort, but have been kept alive by successive executions issued within the time required by law." This being so, the referee held the land belonging to the estate liable to sale for the satisfaction of said claim, "upon issuance of execution and levy upon said land under said judgments, although the judgments are not a

lien on the land until such levy, and although even after said levy all other liens or encumbrances have priority over the lien of the judgment acquired by such levy."

The administrator thereupon filed a petition to sell the land of the testator for assets, the personalty having been exhausted and there being a tract of 90 acres belonging to the estate, and the heirs and devisees were made defendants, but process had not been served upon some of them. An appeal was taken to the Superior Court, and *Judge Daniels,* on motion, ordered a stay of the proceedings and sale until the matter could be heard. "At the May Term of the Superior Court it was agreed by all parties to bring the matter up, by consent, to be heard by his Honor, *W. M. Bond,* and it was further agreed that all irregularities be waived; that all parties were properly before the court, and that the only issue to be determined by his Honor was whether or not the judgment hereinbefore referred to was barred by the statute of limitations. Upon this issue his Honor rendered the following judgment:

"This cause coming on to be heard upon the question as to whether or not the judgments, referred to in the papers, now claimed by J. M. Grantham, against Cæsar Fort, are or are not barred by the statute of limitations, it being admitted that the judgments sued on were docketed more than ten years before this suit was begun, and that no period of three years had elapsed without execution issued: Upon consideration of the argument of the counsel and the facts in the record, it is adjudged, ordered, and decreed by the court, that said claim is barred by the statute of limitations and is not a valid debt or claim against the estate of Cæsar Fort. It is adjudged that each party pay his own costs of the proceedings. The finding of the referee on said question is reversed. Jury trial waived. "W. M. BOND, *Judge.*"

The plaintiff excepted and appealed. He assigned but one error, viz.: "The court erred, as matter of law, in holding that the judgments mentioned in the papers, being the claim of J. M. Grantham v. Cæsar Fort, were barred by the statute of limitations."

Dortch & Barham for appellant.
Langston, Allen & Taylor for appellees.

WALKER, J., after stating the case: It may be well questioned whether an appeal will lie at this stage of the proceedings, the order of sale and the ruling of *Judge Bond* being interlocutory. It does not clearly appear whether there are debts other than the two judgments in suit, but it is to be inferred from the allegations of the petition to sell the land, and recitals in the order of sale, that there are. *Judge Bond* simply passed

upon the statute of limitations as to these two judgments, and rendered no final judgment. However, following the course taken in *Best v. Best*, 161 N. C., 513, we lay that point aside, and proceed to consider the question upon its merits.

The regular issue of executions within each period of three years prevents the judgment from becoming dormant, so as to avoid the necessity of applying to the court for special leave to issue execution under Revisal, sec. 620, but it does not prevent the bar of the statute of limitations, at the expiration of ten years from the rendition thereof under Revisal, sec. 391 (1). *Sawyers v. Sawyers*, 93 N. C., 321; *Lytle v. Lytle*, 94 N. C., 683; *Berry v. Corpening*, 90 N. C., 395. In the case last cited the Court held that the statute of limitations may be set up as a defense by an administrator to any action taken for the enforcement of a judgment against his intestate after ten years from the date of docketing the judgment; and this is so, although executions have regularly issued within each successive period of three years after the judgment was docketed. The lien of the judgment ceases at the end of ten years "from the rendition of the judgment," under Revisal, sec. 574, unless the owner of the judgment shall have been restrained by injunction or otherwise "from proceeding thereon," and the time of such restraint is not counted as a part of the ten years. *Adams v. Guy*, 106 N. C., 275. If the plaintiff, or owner of the judgment, has caused executions to be issued regularly within the successive three years, he may issue without motion or order after the expiration of ten years, although the lien may be gone, and levy on land or personalty; but this right ceases at the death of the debtor, when the creditor must proceed to collect his judgment in the regular course of administration of the decedent's estate, as provided by statute. *Sawyers v. Sawyers*, 93 N. C., 321; *Tuck v. Walker*, 106 N. C., 285; *Holden v. Strickland*, 116 N. C., 185; *Pipkin v. Adams*, 114 N. C., 201. As said in *Murchison v. Williams*, 71 N. C., 135, by *Justice Reade*, under the present system of procedure, the administration of the whole estate is placed in the hands of the representative of the decedent, as best it should be, instead of allowing a creditor to break in upon it with an execution and sale for cash at a possible sacrifice, when it may turn out that the personal assets would be sufficient without a sale of the land at all. See, also, *Mauney v. Holmes*, 87 N. C., at p. 432. It follows, therefore, that when the judgment debtor dies, the creditor must proceed against his representatives, personal or real, and they may resist the enforcement of the judgment by any proper plea or defensive matter, including the bar of the statute of limitations. In *Berry v. Corpening, supra*, *Justice Ashe* said for the Court: "This view of the matter, we are aware, presents the anomaly of a case where under certain circumstances execution might have been issued upon a judgment against a defendant so long as he lives; but when he dies his administrator may

exonerate his estate from liability thereto by setting up a defense that was not permitted to his intestate; but such a result is the logical sequence from the well established doctrine that the statute of limitations related only to the remedy. *Sturges v. Crowningshield,* 4 Wheaton, 122; Wood on Limitations, 26." The result is that the defendant may plead, to a motion for leave to issue execution, anything which has been done, under the original judgment, which exonerates or discharges him from liability thereon, provided it be matter which could not have been set up as a defense to the original judgment; for example, *nul tiel record,* release, payment; or that the debt and damages have already been levied on a prior execution, and so forth, in analogy to the practice of writs of *scire facias* to revive a judgment and to have execution issued thereon. And where the debtor dies, his representatives may do likewise when opportunity is presented. *Berry v. Corpening, supra; McDonald v. Dickson,* 85 N. C., 248.

So that the plea of the statute of limitations was properly considered in this case by the Court, as to the administrator, and also as to the heirs and devisees, under the rule stated in *Best v. Best,* 161 N. C., 515, where it is said: "It is now very generally understood that on a petition to sell land for assets the heirs, in protection of the real estate, may plead the statute of limitations whenever such plea would be available to the executor or administrator in protection of the personalty; but when the claim is evidenced by a subsisting judgment against the executor or administrator, the heir is concluded as to its validity, unless the judgment can be successfully assailed on the ground of 'fraud and collusion.' This position, as laid down in *Speer v. James,* 94 N. C., 417, correcting an erroneous impression to the contrary which had been made in *Bevers v. Park,* 88 N. C., 456, has been again and again affirmed by the Court, and may be taken as accepted law with us. *Lee v. McKoy,* 118 N. C., 518; *Byrd v. Byrd,* 117 N. C., 523; *Proctor v. Proctor,* 105 N. C., 222; *Smith v. Brown,* 99 N. C., 377."

Having settled the question of pleading and practice, we need not consider the legal force and effect of the award of Mr. Robinson, under the reference to him, or, in other words, whether it estopped the administrator or the heirs and devisees to plead the statute of limitations in bar of the judgment, or was conclusive against them upon that question. It may well be doubted if the referee intended to pass upon the application of the statute of limitations to the judgments, as he seems to have placed his decision *solely* upon the ground that, as executions had issued on the judgments regularly within each successive period of three years, execution could be issued and levied on the land, notwithstanding the death of the debtor and the qualification of his administrator, and that the land could be sold thereunder, although the lien had expired, and there were prior liens or encumbrances on the land. If this question was

referred to him by the parties, the decision of it was erroneous, and it does not reach and cover the other question, as to the statute of limitations, which the referee did not pass upon. But all discussion and decision of this matter, as to the effect of the award, may be put out of the case, as the parties have clearly agreed to waive it, and to submit to the decision of the court, *de novo*, the single question as to the bar of the statute of limitations. This is shown by their agreement, copied into the above statement of the case and taken literally from the record, and by the judgment of the court, which distinctly and explicitly confines the decision solely to *that* question, as the *only* one submitted to it; and also by the exception and assignment of error by the appellant, who is the plaintiff in this case. This being so, we are of the opinion that there was no error in the decision below upon the case agreed, holding that the two judgments are barred, because this question has long since been settled by our decisions against plaintiff's contention, as appears from the authorities we have already cited.

The mere issuing of executions regularly and within the prescribed period of three years will prevent the dormancy of the judgment, so that executions may thereafter issue within the same period without motion; but it does not preserve or extend the lien beyond the ten years from the rendition of the judgment, nor does it stop the running of the statute of limitations, the bar of which is complete when the ten years have expired. Whenever the creditor *must* resort to a motion or other proceeding to enforce the judgment, as, for example, when he has waited more than three years before issuing an execution, or when the debtor dies, and he must prove his claim against the estate or bring an action upon it, and perhaps in some other instances, the defendant may plead the statute of limitations or other defensive matter.

There was no error in the ruling below.

Affirmed.

AGERON LAMB BY NEXT FRIEND v. E. V. PERRY AND W. J. WRIGHT.

(Filed 15 September, 1915.)

1. Judgment—Nonsuit—Evidence—How Considered.

Where a judgment of nonsuit upon the evidence is rendered, every fact essential to the plaintiff's cause of action, which it tends to prove, must be taken as established and construed most favorably for him.

2. Same—Defendant's Evidence.

Upon a judgment of nonsuit the only view in which the defendant's evidence is considered must relate to whether there is any part of it which, if favorably construed for the plaintiff, has a tendency to sustain his cause of action.

3. Deeds and Conveyances—Mental Capacity—Undue Influence—Trials—Questions for Jury.

Where in an action to set aside a deed for mental incapacity of the grantor or undue influence exercised upon him, the evidence shows mental weakness on his part, accompanied by other inequitable incidents, such as undue influence, great ignorance and want of advice, or inadequacy of consideration, it presents a case where equity will interfere and grant either affirmative or defensive relief; and if there is evidence tending to establish these facts, though the evidence be conflicting, the issues, as to fraud or undue influence, should be submitted to the jury.

4. Deeds and Conveyances—Mental Incapacity—Requisites.

In order that a testator should have mental capacity sufficient to make a will, it is not required that he be capable of acting wisely or discreetly, but simply that he have sufficient ability to understand the nature of his act, its scope and effect, or its consequences, and to know what he is about.

5. Same—Undue Influence—Evidence—Questions for Jury.

Where the evidence tends to show bodily and mental weakness of the grantor in a deed sought to be set aside, inadequacy of consideration therefor, especially when it is gross, and the mental superiority of the grantee, it is sufficient for the jury to draw an inference therefrom of fraud, or undue influence, and should be submitted to the jury under conflicting evidence, as to whether fraud or undue influence has been practiced in obtaining the instrument.

6. Same—Trials—Burden of Proof.

Fraud in the procurement of a deed for mental weakness of the grantor and undue influence upon him, must be established by the party alleging it to the satisfaction of the jury, by a preponderance of the evidence, but strong, cogent and convincing proof is not required.

7. Equity—Deeds and Conveyances—Fraud.

Equity will set aside a deed procured by the fraud or undue influence of the grantee, and require that he surrender what he has unfairly and unjustly received, with proper deduction for any sum paid out by him, if the specific remedy of rescission, or cancellation, cannot fully and equitably be administered.

APPEAL by plaintiff from *Justice, J.*, at the January Term, 1915, of PERQUIMANS.

This action was brought to set aside two deeds for three tracts of land: (1) The B. F. Lamb Home Place, containing 30 acres. (2) The swamp land containing 210 acres, and (3) the pocosin land containing 110 acres. The deeds were made by the plaintiff to the defendants for one-fourth interest in the said lands, which plaintiff inherited from his father. It was alleged in the complaint that the deeds were void by reason (1) of the mental incapacity of the plaintiff, and (2) undue influence exerted by the defendants before and at the time of their execution. There was evidence that the lands were worth from $8,000 to $35,000, the witnesses greatly varying in their estimates between those two figures. It also appeared, if the evidence is to be believed, that the plaintiff has always been weak in mind and body, having suffered from

paralysis in his youth, and that his body and mind have been since greatly impaired by the habitual use of narcotics or "dope." The fourth interest of the plaintiff in the lands are worth from $2,000 to $8,750, and defendants gave only $1,000 for it, and that amount was payable by installments of $15 per month, and without any security, except the personal promises of the vendees, who are insolvent. At the close of the testimony, the court entered judgment of nonsuit, holding, of course, that there was no evidence to sustain either of the causes of action. It becomes necessary, therefore, to state somewhat fully the important facts which the evidence tended to prove, and this cannot be better done than by reproducing some of the language used by the witnesses.

E. G. Simpson, witness for the plaintiff, testified: "I know the three tracts of land in the two deeds; one is called 'the Swamp Tract,' one the 'Home Tract,' and one the 'Pocosin Tract.' I have lived all my life about one mile from Belvidere. I knew Dr. Lamb and I know his children; they are Ageron, the plaintiff, Theyle, Ben and Galen. Dr. Lamb is not living. I lived at the home place three or four years. The three tracts of land, the Pocosin and the Home Place and the Swamp Tract, are worth eight or ten thousand dollars. I talked with Mr. Perry, and he told me what he paid. I came to town on one first Monday, and saw Mr. Perry at the hotel piazza, and he said: 'I have been waiting for you.' I said: 'The bell has rung and I have to go to the courthouse, but go ahead and I will hear what you have to say.' He said: 'I have been talking of buying Ageron Charles Lamb's interest in the Dr. B. F. Lamb estate, and I would not buy it until I saw you, knowing you were Lamb's agent.' I told him that he had better not buy it; that Ageron Lamb was not competent to sell anything; I told him that he knew that he was not competent to sell anything, and that if he bought the place he would buy a lawsuit, and he said that if that was the case he was not going to buy it. About three weeks or a month after I saw Mr. Perry, the defendant, again on the courthouse grounds, and he told me he had bought his (Ageron's) interest; I asked him what he paid; he told me he was to give him $1,000 in monthly installments of $15 per month. I said: 'Did you give him any security?' he said, 'No.' I remarked to him: 'Then you assume the guardianship of Ageron. What did you mean by paying him $15 per month?' He replied to me, that he, Ageron, was not competent to take care of it, and he thought he had better pay it so he could have it monthly; he remarked that to me; he gave no security whatever for the purchase money—no note, no lien on the land. I told him he would be sued. I wrote to Mr. Theyle Lamb, his brother, next day, that he might take up the matter and bring suit; the next news I got was from Judge Ward, who wrote me a letter that he was wanted to bring suit, and that the

court had appointed me to bring suit, as next friend of Ageron. I then talked with Ageron, and he told me to bring suit. I have been agent for Theyle Lamb, I suppose, something like eight or ten years, or longer, and for his father before him; none of them have lived here in a good long time, except Ageron; I lived at the old home place two or three years before Dr. Lamb died, and I looked after it for Ageron and the others. Have known Ageron all my life; he is some forty or more. His mental capacity was weak to begin with, and has grown weaker; he has never had a bright mind, in my opinion, and has grown weaker from the use of dope. He has taken morphine and laudanum in large quantities; he has been an habitual user of morphine and laudanum for eight years, to my knowledge; he had affliction when he was a child—suffered with a stroke of paralysis, and one leg is a little shorter than the other, and one arm a little shorter than the other, and it affected his whole side. He does not seem to have any regard for the value of anything; he will sell anything for one-half its value, or less; he does not seem to know the value of things. I knew him to sell a horse, worth $150, for $15. It put me to some trouble to get it back; I sent the man word that I would get out claim and delivery papers, and he sent me the horse; and many other things he would sell that way; I knew him to sell a cow and calf for $3; I got the cow and calf back; I knew him to sell a good cow for $5. He has been living at the Lamb place for eight years, or more; he is there now; has been there ever since his father died; been fed and clothed by his relatives, at the instance of his brother. A Mr. Chappell is in charge there now, taking care of him; George Hunter was there before; he stayed there when Mr. Wooten lived there, four, or five, or six years; he has stayed and subsisted at the Home Place a large part of his life; he does not work any; he has been taken care of by his folks all the time; he has been married twice, to my knowledge, and divorced both times; both of his wives were women of the 'underworld.' I knew him about the time he made these deeds. I do not think he had any reasonable judgment of value. I do not think he has ever been competent to sell or transact any business."

By the Court: Do you mean in his life? A. Never since I have known him, and he has been worse for the last eight years than he was before. He would know that he owned a piece of land. Q. What would you say as to whether or not he had mental capacity enough to know if he made a deed, or when he made the deed in question? What would you say as to whether or not he knew what he had; what land he was conveying, to whom he was conveying it, and the scope and effect of the deed of conveyance? I ask you what would you say as to whether or not he would have any reasonable judgment as to what he was doing? A. No, sir.

W. N. Wooten, witness for the plaintiff, testified: "I have known Ageron Charles Lamb since his birth until today; I have lived where he was; I have had him under my control for five years, or nearly so. Dr. Lamb, his father, married a lady in Pittsburg; at that time he had all the children with him except Ageron; after his marriage he came back to fix his business in the condition he wanted it, and he came to me and wanted me to run his place, the old homestead, where Ageron now lives, and he got after me to lease his place for five years; that he had married away and was going to rent it, and we bargained and wrote it in the lease that I was to board Ageron at so much per month; he also stated that as to Ageron's condition, he could not control him in the city, and he had to leave him in the country where he could have some one to look after him, and he stayed with me nearly five years. During that five years he married once, was divorced, and has married since and divorced again. He stayed with me a part of the time and part of the time he loafed about; his father directed that he was to go to school; he went a while and finally quit; I could not prevail with him to go.

"I do not consider he has any mind at all for any business; there is no business capacity about him; he is not competent to do any business."

"Q. What do you say as to whether he had any reasonable judgment of things then? A. He never had.

"Q. In what way did he manifest this imbecility? A. He seemed to have no reason and no judgment; you couldn't tell him anything.

"Q. Couldn't he comprehend? A. No, sir. I have observed him of late years. I see him sometimes every day. I know nothing of his moral habits than what he told me; when he lived with me he did not use it (morphine). I never could tell the difference; didn't know when he was using it and when he wasn't; he came to me to borrow $2, and I told him I didn't have any money to lend, and he said his brother hadn't sent any that week; 'Reckon he thinks I have a bad practice.' I asked him how much money it would take to keep him in morphine a week.

"Q. What would you say about him now, last year, at the time he made these deeds, whether or not he had mind enough to know the scope and effect of what he was doing? A. I would not say he did.

"Q. You would say he didn't? A. Yes, I would.

"Q. What would you say about whether he had any judgment of things, prices and value? A. I say he is not able to judge anything.

"Q. What would you say about whether he had mind enough to know what he had; if he was making a deed, what he was putting in the deed, to whom he was making the deed, and the general scope and effect of

the deed; whether or not he has reasonable judgment of the values of property? A. No; I would not think so.

"Q. Do you think he would, if he had made a deed, know what land he was conveying? A. He wouldn't hardly know.

"Q. Would he know to whom he was conveying? A. I think he would probably know who.

"Q. What land he was conveying? A. I really do not; I cannot answer that; he didn't know what the value of the land was. I know the three tracts of land, Home Tract, Pocosin Tract, and tract called Swamp Tract. I have plowed every row on the Home Farm; I think I know something about the value of land; and I would consider that, at a low estimate, in its present condition, the whole was worth at least $10,000; one of the biggest houses in the neighborhood, old-timey house, built in olden times, built out of nails made in a blacksmith shop, all heart timber and the largest house and best house in the place, is the house on the land in question; land is very valuable around there. The Home Place is worth $100 an acre; it is about one-half mile from Belvidere; the Pocosin land is worth about $50 an acre, and the Swamp tract $100 an acre, I should think; putting it at all this, it would make $35,000. I would say that the $10,000 was a very low estimate—I stated in its present condition."

J. H. Smith testified that he had known plaintiff from his youth, about 35 years, and that his mind is not right, and has been enfeebled still more by the excessive use of morphine; that he has not been mentally able to attend to business; would sell his property for most anything he could get for it and for much less than it was worth; he had no idea of values, and did not seem to know the value of the property he was selling to defendants. He also stated that plaintiff did not have sufficient mind to know the scope and effect of the deed; had no reasonable judgment about it and no idea of its general value, nor did he know what property he had.

Dr. R. W. Smith testified that plaintiff habitually uses morphine and "from a mental and physical standpoint is a wreck, and had no reasonable judgment of things and values; he did not know what land he had; while he might know that he was conveying land to Mr. Perry and Mr. Wright, he would not understand the scope and effect of the transaction, or what he was doing from start to finish, nor would he understand whether he was getting $1,000 or $10,000 for his land—too much or too little."

There was much other evidence of the same kind as that already stated.

The defendants introduced testimony tending to contradict that of plaintiff's witnesses, and among the witnesses they called was the defendant himself, and his testimony tended to contradict that of the

plaintiff's witnesses, and to show that he had mental capacity sufficient to execute the deeds. He said, though, that he was addicted to the free if not excessive use of morphine, 250 tablets a week, which he took for a pain in his side, and that defendants had paid only about $40 for the land, that is, they had paid $15 twice and a few dollars at another time.

Plaintiff excepted to the judgment of nonsuit, and appealed.

Ward & Thompson for plaintiff.
P. W. McMullan and Charles Whedbee for defendants.

WALKER, J., after stating the case: The court having held that there was no evidence to sustain either cause of action, the one as to mental incapacity or the other as to undue influence, which is another and milder name for fraud, we must apply the familiar rule in cases of nonsuit, and construe the evidence most favorably for the plaintiff, and every fact essential to the cause of action which it tends to prove must be taken to be established, as the jury, if the case had been submitted to them, might have found the facts to be as alleged by the plaintiff and contrary to the contention and proof of the defendant. *Brittain v. Westhall*, 135 N. C., 492; *Morton v. Lumber Co.*, 152 N. C., 54; *Trust Co. v. Bank*, 166 N. C., 112; *Christman v. Hilliard*, 167 N. C., 4. And this rule applies in favor of the defendant where a verdict is substantially directed. *Forsyth v. Oil Mill Co.*, 167 N. C., 179. Where the evidence is conflicting the case is one for the jury to settle the contradictions and find the facts. *Alexander v. Statesville*, 165 N. C., 527; *Forsyth v. Oil Mill Co., supra*. It was suggested that the court was unduly impressed by the plaintiff's own testimony, which was thought to indicate the possession by him of full mental capacity and an absence of undue influence; but if that be so it was not regular for the court to isolate any particular part of the evidence and decide the case upon it alone, but the whole of the evidence must be considered, as it is eminently the province of the jury, and not of the judge, to pass upon its weight and to determine its probative force, and, for this purpose, to make the selection between that which is credible and that which is not. The defendant's testimony is only considered in order to ascertain if any of it tends to prove the plaintiff's case, and it is not at all permissible for the court to say on which side the evidence preponderates, or to decide against one party or the other according to its own conviction of what is the truth. This is precisely what our statute forbids to be done. *Guano Co. v. Mercantile Co.*, 168 N. C., 223.

With these rules kept steadily in view, it seems to be plain that there was error in the judgment below.

We have recently considered the law as to the mental capacity required for the valid execution of a deed, and the undue influence of

fraud sufficient for the rescission or cancellation of a contract. *Hodges v. Wilson,* 165 N. C., 323; *Sprinkle v. Wellborn,* 140 N. C., 163; *Cameron v. Power Co.,* 138 N. C., 365.

We take the law to be settled that the mere fact that a man is of weak understanding, or is below the average of mankind in intellectual capacity, is not of itself an adequate ground to defeat the enforcement of an executory contract, or to set aside an executed agreement or conveyance. But where mental weakness is accompanied by other inequitable incidents—such as undue influence, great ignorance and want of advice, or inadequacy of consideration—equity will interfere and grant either affirmative or defensive relief. This is the rule that is stated in Fetter on Equity, p. 143, and Eaton on Equity, p. 316. *Lord Hardwicke* said in *Earl of Chesterfield v. Janssen,* 2 Vesey, Sr., 125: "A third kind of fraud is that which may be presumed from the circumstances and conditions of the parties contracting; and this goes further than the rule of law, which is that it (fraud) must be proved, and not presumed; but it is wisely established in this Court to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience as to take advantage of his ignorance."

Bispham on Equity (5 Ed.), sec. 230, refers to the subject in this way: "Whatever be the cause of the mental weakness—whether it arises from permanent injury to the mind, or temporary illness, or excessive old age—it will be enough to make the court scrutinize the contract with a jealous eye; and any unfairness or overreaching will be promptly redressed. As has been said by the Supreme Court of the United States, 'Wherever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to an absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party or his representatives or heirs, interfere and set the conveyance aside.' 'The result of the decisions,' says an English chancery judge, in a modern case, 'is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a court of equity will set the transaction aside.' A mere latent suspicion of unfairness, however, will not be enough. On the other hand, it need scarcely be remarked that the mere circumstance of old age or physical feebleness will not render a transaction fraudulent, if, in point of fact, the party is intelligent and capable." See *Allore v. Jewell,* 94 U. S., 511; *Griffith v. Godey,* 113 U. S., 95, and Bispham on Equity (6 Ed.), sec. 230 (p. 333), note 4, where the cases are collected. The mental capacity required for the valid execution of a deed is the ability to understand the nature of the act in which the party is engaged and its

scope and effect, or its nature and consequences—not that he should be able to act wisely or discreetly, nor to drive a good bargain, but that he should be in such possession of his faculties as to enable him to know at least what he is doing and to contract understandingly. There is no particular formula to be used in such cases, as said by the Court in *Morris v. Osborne,* 104 N. C., 609, but the law in this respect should be explained to the jury with reference to the special and peculiar facts of the case being tried, and under the guidance of such general principles as have been settled and declared by the courts.

A want of adequate mental capacity of itself vitiates the deed, while mere mental weakness or infirmity will not do so, if sufficient intelligence remains to understand the nature, scope, and effect of the act being performed. But while this is true, weakness of mind, whether natural or induced by the excessive use of drugs or any other cause, when accompanied by such circumstances as tend to show that advantage was taken of it by the party who procured the deed, or when it appears that there is not only weakness of mind, but inadequacy of consideration, especially when it is gross, and the situation of the parties is so unequal, by reason of the weakness of the one and the mental superiority of the other, or for other reason, the jury may infer fraud, or undue influence, which in law is the same thing. Mere weakness of mind or inadequacy of price, unless the latter be such as amounts to *apparent* fraud, will not be sufficient to authorize the cancellation of a deed, but either or both of them may be considered by the jury in ascertaining whether fraud has been practiced in obtaining the instrument. This fraud is not required to be directly established by proof, but may be inferred from all the circumstances of the case, such as weakness of mind and body, inadequacy of price, and inequality in the positions of the parties. This kind of fraud, as a fact, is not presumed, but must be established by the party who alleges it by the clear preponderance of the evidence to the satisfaction of the jury, but strong, cogent, and convincing proof of it is not required, as contended by defendant's counsel in this case. *Harding v. Long,* 103 N. C., 1; *Hodges v. Wilson, supra; Culbreth v. Hall,* 159 N. C., 588, and *Fraley v. Fraley,* 150 N. C., 501, where the question is fully considered by *Justice Hoke,* with ample reference to the authorities. Where it is proposed to change the substance of the contract by altering its terms, under the equity for correction or reformation and upon the ground of mistake or fraud, or by engrafting upon it a trust by parol, the *quantum* of proof is different, and the evidence must be of a more cogent and convincing nature than in the other case, because of the strong presumption that parties in the written memorial of their contract have expressed themselves as they intended to do, and more conclusive proof than is ordinarily required must be forthcoming in such cases. The

law, it is true, does presume, in the first instance and without proof from either side, that the execution of a deed has not been fraudulently procured, and for this reason places the burden of proof on the party alleging fraud, but this presumption is weaker than the one as to the correctness of the paper, when it is proposed to alter its terms, or to add something to it, which was not written into it by the parties, or to change or modify its terms in any essential respect. *Lehew v. Hewett,* 138 N. C., 6.

When we apply these well settled principles to the facts of this case, the error of the court in withdrawing the case from the jury and dismissing the action upon its own view of the facts becomes apparent.

The case is not, in principle, unlike *Sprinkle v. Wellborn, supra,* where it was substantially said: So weak was she as to be easily and completely subjected to the power and influence, if not sheer dictation, of the defendant, and her condition must have been known to him, if the testimony is credible. If any mental operation of importance was required in the transaction, it was practically all on his side. It seems that he could, at his will and pleasure, mould her resolutions, if she had any, to suit his own designs, so like was she to clay in the hands of the potter. It is needless to prolong the decision. To be sure, there was evidence in conflict with that offered by the plaintiff, but we are considering the version of the facts as presented by the plaintiff's proof, which may be accepted by the jury to the utter rejection of the defendants, and we are not called upon to go farther than to hold that there is some evidence in support of the plaintiff's allegations. We need not refer any more to *Sprinkle v. Wellborn,* except to remark that it bears a strong resemblance to this case in some particulars, and that there is one fact which is shown by the defendant's declarations in this case which did not appear in that one, viz., the knowledge of the defendants that plaintiff was weak-minded and unable to manage his own affairs, for they stated to one, at least, of the witnesses, that Ageron Charles Lamb was not competent to take care of the money they paid, and for that reason they had agreed to pay it in monthly installments of $15. It must not be forgotten that there is proof in the case that the amount paid was only about one-eighth of the value of plaintiff's interest in the land, and only one-half, if we adopt the lowest estimate of one of his witnesses. There was, therefore, some evidence that the plaintiff was an imbecile and, whether from natural weakness or the excessive use of morphine, he was deprived of the mental capacity the law regards as necessary to the execution of a deed. But whether or not he had mind enough to act for himself in the transaction, there was evidence of his mental weakness, of great inadequacy of consideration, and of marked inequality between two men of pre-

sumably normal minds and intellectual grasp on the one side, and this weakling on the other, with some other circumstances of more or less importance, showing that a fraudulent advantage was taken of him in securing his deeds.

Whether there is any difference, in moral quality, between the act of obtaining a deed for land from one known to be totally bereft of reason and mental capacity and that of procuring one from a person merely of weak understanding, but of such feeble mind as to be unable to guard himself against imposition or to resist importunity and to take care of his interests, it does not lie within our province to decide, but, in law, and in so far as the validity of such a transaction may be involved, where there are elements indicative of fraud and dishonesty, we know that there is not and should not be any difference, if the jury, who are the triers of the facts, find that there was actual fraud, and in either case a court of equity will rescind the contract and cancel the deed or require the vendee to surrender what he has unfairly and unjustly received, with proper deduction for any sums paid out by him, if the specific remedy of rescission or cancellation cannot be equitably administered.

We have proceeded upon the assumption that the evidence which tends to establish the plaintiff's contention is true, and that the jury would have so decided if the case had been submitted to them, which is the proper way to consider it. The defendant, at the next trial, may be able to rebut the plaintiff's evidence and to satisfy the jury that the transaction was perfectly fair and honest, and that no undue advantage was taken of the plaintiff, but that he had sufficient mental capacity to understand the nature of the transaction, its scope and effect, and that while he may have acted with poor judgment and discretion, and made a sorry bargain, it was not because of any natural insufficiency or impairment of his mental faculties caused by his habits or the low state of his health. We express no opinion as to the weight of the evidence, but simply hold that the nonsuit was improper. It will be set aside and a new trial granted.

New trial.

J. L. SEARS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 15 September, 1915.)

1. Railroads—Master and Servant—Negligence—Defective Coupler—Duty of Master—Inspection—Proximate Cause.

While engaged in the duty of cutting out a defective car in the defendant's train, the plaintiff, an employee on the defendant's local switch engine, was standing on the rear footboard of the locomotive, and, when it backed up to the car for the purpose of being coupled thereto by the plaintiff, his foot was caught between the bumpers of the car and crushed;

there was proof that the injury was caused by a defect in the footboard of the engine and defects in the coupling, *i. e.*, draw-heads, lock pins, and lift levers. Under these facts, an instruction was held correct to this effect, that if the jury should find that the coupler was not defective, they should answer the first issue "No"; and this would also be their answer to the issue if they found the coupler to be defective, but that the defect was not due to the defendant's negligence in failing to exercise proper care as to its inspection and repair, or that its negligence, if any, had not contributed proximately to the plaintiff's injury.

2. Railroads—Interstate Trains—Interstate Commerce—Local Switching—Federal Employer's Liability Act.

A train made up and ready to start for its destination beyond the State, with steam up in the locomotive and the engineer in the cab, and moving under the usual signals from a switchman, who was one of the crew of a switching engine, engaged in cutting out a defective car from the train, is regarded as an interstate train, and the company is liable in damages for its negligent injury to the switchman, under the Federal Employer's Liability Act, as the duty he was performing at the time, though he was engaged on a local switching engine, was one performed while he was employed in interstate commerce.

3. Same—State Statute.

In this action, which was brought by a switchman of the defendant's train crew to recover damages for alleged negligence of the defendant in providing an improper coupler on a train made up and ready to start for a destination beyond the State, it is held that the question whether the train was an interstate one, or the plaintiff was at the time engaged in interstate commerce, is not material, it appearing that the alleged negligent wrong was committed since the enactment of ch. 6, Public Laws of 1913, which, in this respect, is substantially identical with the Federal statute.

4. Same—Contributory Negligence—Assumption of Risks—Trials—Issues.

When either the State or Federal statute is applicable in an action involving the liability of a railroad company to its employee, arising from its negligence, and the jury have found that the plaintiff, a switchman, was injured by a defective coupler on the train while in the performance of his duties, the defenses of contributory negligence and assumption of risks are eliminated, and issues thereon are immaterial, under our statutes or the Federal law.

5. Negligence—Surgical Operations—Proximate Cause—Trials—Evidence.

Where there is some evidence that, as the result of a personal injury, which was alleged to have been negligently inflicted by the defendant on its employee, two surgical operations were performed, and that the second one was made necessary by reason of the defendant's negligence and as a proximate result thereof, it is proper for the trial judge to refuse to instruct the jury that in no view of the case was the defendant liable for the additional suffering, etc., caused by the second operation.

6. Master and Servant—Railroads—Negligence—Federal Employer's Liability Act—State Statute—Contributory Negligence—Assumption of Risks—Trials—Instruction.

This action for damages for a personal injury to an employee, which was alleged to have been negligently inflicted by a railroad company, and caused by defective couplers on its cars, coming within the intent and meaning of both the Federal Employer's Liability Act, the Defective Appliances Act, and also our statutes of 1913 and 1897, an instruction to

the jury that if the injury was caused by a defective coupler, due to the defendant's negligence, contributory negligence would not defeat his recovery, was correct; and the same would apply to assumption of risks under our law, as well as under the Federal statutes.

APPEAL by defendant from *Carter, J.*, at the May Term, 1915, of EDGECOMBE.

Civil action. The plaintiff was employed by the defendant as a switchman, and, on 3 June, 1913, he was ordered as one of the switching crew to cut out a car in a train which had been made up at Rocky Mount, N. C., and was then ready to proceed on its journey to Florence, S. C. The car, on inspection, after the train had been made up, was found to be in bad condition, and for this reason was ordered to be cut out. While engaged in this duty, the plaintiff was injured, his left foot being crushed, and for the injury thus sustained he brought this action. In performing his duty, plaintiff was required to stand on the rear footboard of the switching engine. Fourteen cars at the rear of the train were uncoupled and carried by the switching engine to a side-track. The engine then returned to the track where the other cars were standing and was backed to the end of the car which was to be cut out, and while attempting to make the couplers, between the engine and car, the plaintiff's foot was caught between the bumpers of the engine and car and crushed, as above stated. It is alleged, and there was proof to sustain the allegation, that this injury to the plaintiff was caused by a defect in the footboard of the engine and defects in the coupling, that is, in the draw-heads, lock pins, and lift levers. Defendant alleged that the injury was caused by the negligence of the plaintiff in making the coupling, and especially in unnecessarily placing his left foot in a dangerous position, of which there was some evidence. Two surgical operations were performed on plaintiff's foot. Defendant alleged, with proof to sustain the contention, that the second operation, when the leg was amputated, was not caused by its negligence, but by the unskillfulness of the first operation alone. There was evidence that the second operation was necessary, the surgeon, Dr. Carnegie, who performed it, testifying: "It was impossible for me to straighten the heel out so he could walk, and it necessitated putting the stump on the floor when walking, due to contraction of heel. He was bound to have suffered considerably, as there was no pad except a skin flap; it was impossible for that to give enough cushion to prevent him having pain."

"Q. From what you say of the plaintiff's injury, after examining the limb, do you find the second operation necessary? A. Yes; it was absolutely necessary."

Defendant tendered in apt time the following issues:

1. Was the plaintiff injured by the negligence of the defendant company?

2. Did the plaintiff, by his own negligence, contribute to his own injury?

3. Did the plaintiff voluntarily assume the risk of the injury and hurt sustained by him?

4. What damages, if any, is the plaintiff entitled to recover?

The court refused to submit the issues, and defendant excepted.

The jury returned the following verdict:

"Was the plaintiff injured by the negligence of the defendant company, as alleged in the complaint? Answer: Yes."

"If so, what damages has plaintiff sustained? Answer: $5,000."

Defendant requested the following instructions:

1. In considering the question of damages, you will not consider at all the shock and effect due to the second operation, nor effect, pain, or suffering caused by or consequent upon the second operation.

2. While the law is that contributory negligence will not prevent a plaintiff from recovering for personal injury, the law does allow and require the jury to diminish the damages in proportion to the amount of negligence attributable to the plaintiff in causing the injury.

The court charged the jury as follows:

1. The transaction in which the parties were engaged at the time of the alleged injury being an operation of interstate commerce, the rights and obligations of the parties are governed by the Federal law which imposes upon the defendant the absolute duty of equipping its engines and cars with automatic couplers and to exercise the degree of care which has been heretofore defined to you as proper care, and to have and to keep such couplers in suitable repair and condition so they will at all times be automatic in their operation; that is to say, that they will couple by impact.

Defendant excepted, contending that this is not applicable to the facts.

2. You will consider the first issue without regard to any question as to whether the plaintiff was using his foot or his hand or both, in trying to effect a coupling, if a defect in the engine coupler, which was due to the negligence of the defendant, contributed to the plaintiff's injury as a proximate cause of it, as no contributory negligence of the plaintiff would defeat his recovery.

Defendant excepted, contending that this is not applicable to the facts.

3. But even though you should find the defendant negligent in respect to the condition of the coupler, such negligence could not be deemed to have contributed to the plaintiff's injury, if his injury resulted from his using his foot in an operation not reasonably related to the alleged defective condition of the coupler on the engine, such, for instance, as pushing the draw-head into the alignment with the coupler on the engine.

The defendant excepted to this, contending that the instruction is not applicable to the facts.

4. Nor can you take into consideration any pain or suffering or disability which may have resulted from the second operation and amputation, unless the jury are satisfied by the greater weight of the evidence that said second operation and amputation were necessary consequences of the injury alleged to have been sustained by him on account of the negligence of the defendant.

To this the defendant excepted, for that it was erroneous.

Judgment was entered upon the verdict and defendant appealed, after reserving its exceptions.

Gilliam & Gilliam and James H. Pou for plaintiff.
John L. Bridgers for defendant.

WALKER, J., after stating the case: We have arranged the statement of the case so as to present only so much of it as relates to the defendant's assignment of errors. The court instructed the jury that if they did not find that the coupler was defective they would answer the first issue "No," and if they found that it was defective, they would still answer the issue "No," unless they also found that the defect was due to the defendant's negligence in failing to exercise proper care in the inspection and repair of the coupler, which contributed proximately to the plaintiff's injury. The record shows that "the court stated fully the contentions of the parties and reviewed the evidence bearing upon the same." There are four questions presented in defendant's exceptions:

1. Did the court err in holding that this was a transaction of interstate commerce to which the Federal laws applied?

2. Was it competent for the jury to consider additional suffering or shock caused by the second surgical operation?

3. Was it proper for the court to refuse to submit the issues tendered by the defendant and thereby withdraw the questions of assumption of risk and contributory negligence from the jury?

4. Was there any affirmative error in the charge?

1. The first question may be well disposed of by a bare reference to the evidence. The witnesses, both for plaintiff and defendant, agreed in their testimony that the train in which was, what is called in the case, the "bad order car" had been made up, as an extra train, at South Rocky Mount, N. C., and was then ready to proceed to Florence, S. C., when the defect in one of its cars, there being forty-five in all, was discovered and that car was removed from the train. The engine which was to carry the train to Florence, S. C., had steam up and R. C. Garland, the engineman, was in the cab, and moved the train under signals from the

plaintiff. This would seem to properly characterize this train as one engaged in interstate commerce, and while the plaintiff was employed on a local shifting engine, any injury to him through the negligence of the defendant, while he was engaged in cutting out the "bad order car" from this train, is regarded in law as one received while he was "employed in such commerce." This view of the question is sustained by *Pedersen v. D. L. and W. Railroad Co.,* 229 U. S., 146, from which we extract the following principles:

1. Under the Federal law a right of recovery exists only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed in such commerce; but it is not essential that the coemployee causing the injury be also employed in such commerce.

2. One engaged in the work of maintaining tracks, bridges, engines, or cars in proper condition after they have become, and during their use as, instrumentalities of interstate commerce, is engaged in interstate commerce, and this even if those instrumentalities are used in both interstate and intrastate commerce.

3. An employee carrying materials to be used in repairing an instrumentality of interstate commerce is engaged in such commerce, and, in this connection, it was held that such an employee carrying bolts to be used in repairing an interstate railroad, and who was injured by an interstate train, is entitled to sue under the Federal law in regard to an employer's liability, it being the act of Congress of 1908, the true test being: Is the work in question a part of the interstate commerce in which the carrier is engaged?

It follows, therefore, that if the train described in this case was engaged in interstate commerce, the act of the defendant in cutting out the "bad order car" was performed by him while employed in such commerce, for the two cases, in principle, at least, are clearly analogous. This will appear by a consideration of the language of the Court in the *Pedersen case,* where *Justice Van Devanter* said: "The statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct "any defect or insufficiency . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment" used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as

a whole. But this is an erroneous assumption. . . . Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

The question then recurs: Was this train, at the time of the injury, being used in interstate commerce? We are of the opinion that an affirmative must be given to this question, if we follow, as we are required to do, the decisions of the highest Federal court in *N. C. Railroad Co. v. Zachary,* 232 U. S., 248, 260, and the cases therein cited, especially *St. Louis and San Francisco Ry. Co. v. Seale,* 229 U. S., 156, 161. In the *Zachary case* the engineer, after inspecting, oiling, firing, and preparing his engine for starting on a trip from Selma, N. C., to Spencer, N. C., was killed by an engine of defendant railroad company which was being negligently moved on one of its tracks and while he was crossing the track on his way to his boarding-house for supper. The train was to carry interstate cars, which came from Virginia, but they had not been coupled up at the time of the injury. It was held that he was at the time employed in interstate commerce and his case was governed by the Federal law, although he had mere prepared his engine and cars for the journey, but had not moved them from the station. In the case of *Railway Co. v. Seale, supra,* the injury occurred while the employee, who was a yard clerk, was engaged in the duty of inspecting and making a record of car seals and of checking the cars with the conductors' lists. While he was going to a train which had come from another State to perform this kind of work, he was struck and fatally injured by a switch engine, which, as was claimed, was being negligently operated by the defendant railway company. With reference to these facts the Court said in 229 U. S., at p. 161: "The interstate transportation was not ended merely because the yard was a terminal for that train, nor even if the cars were not going to points beyond. Whether they were going further or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the State line," citing *McNeill v. Southern Railway Co.,* 202 U. S., 543, 559, and *Johnson v. So. Pac. Co.,* 196 U. S., 1, 21.

If the breaking up of a train which has come from another State is a part of interstate commerce, we do not perceive why the making up of the train, its inspection and proper repair are not equally acts of interstate transportation. See, also, *Railway Co. v. Lindsay,* 233 U. S.,

42. In *Ill. Cent. Railroad Co. v. Behrens,* 233 U. S., 473, while not deciding the question, it is strongly intimated, at the close of the opinion, that an employee engaged in work such as was done by the plaintiff in this case would be considered as engaged in interstate commerce and protected by the Federal Employer's Liability Act and the Safety Appliance Act as well. *Johnson v. Great Northern Ry. Co.,* 178 Fed. Rep., 643. We have again discussed this question somewhat at length, not only because of the zeal and earnestness with which the contrary view from ours was pressed upon our consideration, but because of its growing importance in a large number of cases. Our opinion is, though, that it is settled adversely to the defendant's contention in *Lloyd v. Railroad Co.,* 166 N. C., 24. The two cases are identical in their facts, so far as this point is concerned, and if *Lloyd's case* stands the test of the higher court to which it has been carried by writ of error, it will be thoroughly decisive of the question we have discussed, and in respect to the view we have taken of it. But if the plaintiff was not, at the time of the injury to him, employed in interstate commerce, as the alleged negligent wrong was committed since chapter 6 of Public Laws of 1913 was enacted (3 February, 1913), that is, in June, 1913, the case is governed by the provisions of that law, which are identical, substantially, at least, with the Federal statute, and in this view the question may be considered of little practical importance, as was held in *C. & N. Railway Co. v. Gray,* 35 Supreme Court Reporter, p. 620. Under the State law, assumption of risk is not available to the defendant, as the injury was caused by a defect in appliances, and contributory negligence is treated in the same manner as under the Federal statute.

2. This also disposes of the third question we have stated, which involves the correctness of the ruling by which the court refused to submit the issues tendered by the defendant. The jury having found that the plaintiff was injured by a defective coupling, the defenses of assumption of risk and contributory negligence were eliminated, both under the Federal and State law.

3. The second question raised by defendant, that it was not liable in damages for any increased injury resulting from the second surgical operation, is, we think, without merit, in the view we take of the record. The prayer of the defendant would require the court to instruct the jury that in no view of the case was it liable for such additional injury, whereas its liability depended upon whether the second operation was made necessary by defendant's negligence as a proximate result thereof or was caused solely by the unskillful manner in which the first operation was performed. The court instructed the jury that it must have been a *necessary* consequence of the injury which resulted from the de-

fendant's negligence. Defendant has no reason to complain of this instruction, for it was as favorable to it as could be expected, and moreover it implied that if the additional pain and suffering were caused solely by the unskillfulness of the surgeon who performed the first operation, defendant would not be liable therefor.

4. We can see no error in the charge of the court. It properly instructed the jury that if the injury was caused by a defect in the coupler due to defendant's negligence, contributory negligence of the plaintiff would not defeat his recovery. This is correct, as it is so expressly provided in the Federal Employer's Liability Act and our statute of 1913. And the same may be said as to assumption of risk, as the two defenses, in this respect, are subject to the same principle under the Federal statute, as will appear by reference to sections 3 and 4 of the said act of Congress. As to assumption of risk, similar provision is made by our law. Public Laws 1897, ch. 56 (Revisal, sec. 2646). *Elmore v. R. R. Co.*, 132 N. C., 865.

After a careful review of the case, we find that no error was committed by the court at the trial of the case.

No error.

GREGORY v. EASTON COTTON OIL COMPANY.

(Filed 15 September, 1915.)

1. Master and Servant—Employee—Vice Principal—Fellow-servant—Joint Negligence—Trials—Principal—Burden of Proof.

Where the negligence of the master and a fellow-servant concur in producing an injury, the injured employee, himself being free from blame, can recover judgment from either or both; but where the negligence of the employer is made to depend upon an order of his vice principal or manager, his negligence must first be established, having regard to the character of the order, the position and authority of the person to whom it was given, and the attendant circumstances.

2. Master and Servant—Employee—Vice Principal—Negligence—Orders to Servant—Remote Damages.

Where, acting under the orders of the manager of a cotton-seed oil plant, the assistant manager goes upon a platform whereon bales of cotton are thrown at frequent intervals from the door of a ginhouse elevated above, the time being at night and the platform insufficiently lighted by the light from the ginhouse door, and the assistant manager, being in charge, tells the hands in the door to look out for him, in which they acquiesce, but, while getting the samples, the assistant manager is injured by a bale of cotton being thrown upon the platform through the door and rebounding upon him, which is the negligence alleged in his action to recover damages of the company: *Held*, the defendant company is not held to reasonably anticipate the conditions under which the injury occurred, or that it would result therefrom, and the damages, being too remote, are not recoverable.

3. Master and Servant—Employer—Duty of Master—Safe Place to Work—Reasonable Care.

The master may not delegate to another his duty to provide his servant a safe place to work, but this does not require him to provide an absolutely safe place for the purpose, or insure the safety of his servant, the measure of his duty being that he should exercise proper care in providing a safe place to work.

APPEAL by plaintiff from *Justice, J.*, at Spring Term, 1915, of PERQUIMANS.

The facts are sufficiently stated in the opinion of the Court.

Charles Whedbee and P. W. McMullan for plaintiff.
W. A. Worth and L. T. Seawell for defendant.

HOKE, J. The facts in the case tended to show that, at the time of the occurrence, the defendant company owned and operated a cotton-seed oil mill in the town of Hertford, N. C., and in connection therewith a cotton gin and press; that the gin and press were so constructed that the floor where the cotton was baled was 9 or 10 feet above a platform running along the building, and, as the cotton was pressed into bales, it was thrown by the hands from a door of the ginhouse down onto this platform, rolling as it might chance in the fall; that when the gin was being operated there was perhaps a bale of cotton rolled out of the gin on the platform something like every fifteen minutes; that W. N. Gregory was manager of the plant, and plaintiff was the assistant, having general charge of the machinery, and having immediate charge of the gin and press and its work; that on the evening of 17 December, 1913, and it was then dark, plaintiff was directed by the manager to bring him a sample of "cotton linters," these linters being then on the platform about 10 feet straight off to the side from the door of the ginhouse. There was no light on the platform, but there were lights in the ginhouse which threw some light on the platform when the gin door was open, but not so as to light the place where the witness was directed to go. Witness procured a sack and started to get the linters, and as he went the laborers operating the gin were in the gin door, and plaintiff held up his bag and told them he was going to draw samples and to look out for him. They nodded their heads, "All right"; that plaintiff had been there before to get linters in the daytime, but never before at night; that plaintiff then proceeded to get the linters, and while he was so engaged the hands in the gin threw a bale of cotton on the platform; it struck the pile of bales already thereon, and rolled down on plaintiff's leg, breaking it just above the ankle, etc., causing him much suffering and loss of time, etc. Plaintiff is still employed at the plant and getting the same wages. Witness, testifying in his own behalf, stated that he knew the bales were being thrown out on the platform, and that

he was liable to be hurt if this was done while he was engaged in getting the linters. Upon these, the facts chiefly relevant, we are of opinion that plaintiff was properly nonsuited.

It is true, as contended by defendant, that where the negligence of the master and a fellow-servant concur in producing an injury, the injured employee himself being free from blame, can recover judgment from either or both. This has been several times recognized in decisions of our Court, as in *Wade v. Contracting Co.*, 149 N. C., 177; 62 S. E., 919, and other cases; but, in order to a proper application of the principle, the negligence of the employer must be first established, and, having regard to the character of the order, the position and authority of the person to whom it was given, and the attendant circumstances, we fail to see anything in it that justifies a finding of actionable negligence against the defendant company. There is no testimony tending to show that employees of the defendant were customarily called on to work on this platform while bales of cotton were being dumped upon it, and which might have been made the occasion of imputing negligence, whether there was or was not a light. Nor was the order given to some subordinate employee or outside messenger, improperly sent to do a dangerous piece of work; but it was an exceptional order, given by the manager to his assistant, who, according to the evidence, had immediate charge of the gin and its work and the hands employed there. Having been directed to get these linters from the platform at the time and under the circumstances stated, he should have stopped the gin work until he procured the linters, if this was necessary to his protection. As a matter of fact, he did signal to his hands to "look out for him, and they nodded acquiescence and agreed to it"; but their failure to act on their agreement must, in our opinion, be imputed to them alone, and not to defendant, for, as heretofore stated, the order of the manager to get the linters having been given to a man of experience, fully aware of incidental dangers, and having immediate charge and control of the gin, there was no reason to suppose that such a one would not take the necessary steps to protect himself, and the giving of the order, therefore, should not be considered as the proximate cause of the injury within the meaning of the issue. There was no reasonable ground to foresee that an injury would result. *Brewster v. Elizabeth City*, 137 N. C., 392, 49 S. E., 885; *Ramsbottom v. Railway*, 138 N. C., 38, 50 S. E., 448.

It is urged for the appellant that the duty of the master to provide his employee with a safe place to work is "primary, absolute, and nondelegable," and that, for a failure in this respect, the master was guilty of negligence, and, on the testimony, the jury could well find that there was concurrent negligence of the master and the employees who threw the bale on the platform. The position is sound in so far as it states the duty of the master to be primary and nondelegable; but it is not "abso-

lute," in the sense that the employer of labor is ever an insurer of the safety of his laborers. He is held to the exercise of proper care in providing a safe place to work, and this, as a general rule, is the measure of his obligation. *Ainsley v. Lumber Co.,* 165 N. C., 122, 81 S. E., 4; *West v. Tanning Co.,* 154 N. C., 44, 69 S. E., 687. And in the present instance the company, through its manager, having given the order to the assistant, who had full charge of the gin, the only agency that created any danger, there was no good reason to foresee that an injury would occur, and no responsibility, therefore, should attach. The case comes rather under the principle approved and applied in *Lane v. Railroad,* 154 N. C., 91, 69 S. E., 780, and we find no error in the judgment as rendered.

Affirmed.

G. D. B. PRITCHARD, RECEIVER, v. PASQUOTANK AND NORTH RIVER STEAMBOAT COMPANY.

(Filed 15 September, 1915.)

1. Deeds and Conveyances—Lands—Implied Warranty.

In the absence of fraud or mistake in a conveyance of land, there is no implied covenant or warranty of title, either at law or in equity, and the grantee has no remedy on the ground of failure of title, unless a warranty is expressed in the deed or can reasonably be inferred from a fair construction thereof.

2. Same—Wharves—Expressio Unius.

When a conveyance of a steamboat line expressly covenants for a good title, or warrants the title only as to liens or encumbrances on steamers, it excludes the idea that the wharves, landings, etc., were intended to be included therein, upon the maxim, *Expressio unius est exclusio alterius.*

3. Deeds and Conveyances—Wharves—Fixtures—Implied Warranty.

Wharves, which are used in connection with a line of steamboats, and built upon the riparian lands, or banks of the stream, or annexed thereto, and manifestly intended to become a part thereof, will not be considered as personal property, so as to imply a warranty of the title in a conveyance of the steamboat line, as in sales of such property, although the vendee may not have acquired a fee-simple absolute therein, but only a base, qualified, or determinable fee.

4. Same—Defective Title—Steamboats—Deposit of Liens—Contracts.

Where a steamboat company conveys to another all of its property, including its boats, landings, wharves, etc., and deposits with a trustee a certain sum of money to discharge liens upon the steamers alone, without any stipulation that any part of the fund should be applied as compensation for defects in the title of the other property conveyed, the conveyance itself clearly forbids that any of the funds, so deposited, should be used for purposes not specified, or to compensate the purchaser for any defect in the title to one of the wharves conveyed.

APPEAL by defendant from *Justice, J.,* at the February Term, 1915, of PASQUOTANK.

This action was brought to recover of W. G. Gaither, Jr., trustee, six hundred and thirty-nine 86-100 dollars, it being the balance of two thousand dollars deposited with him by agreement of the LeRoy Steamboat Company and the defendant to pay off certain liens on two steamers, *Virginia* and *Haven Belle*, which were sold by the LeRoy Steamboat Company to the defendant. On 16 July, 1911, the LeRoy Steamboat Company, in consideration of $18,000, sold and delivered to the defendant the said two steamers, "together with all tackle, apparel, and furniture thereto belonging, and any and all wharves, docks, piers, and landings at Maud's and Newbern's Landings, Hall's Harbor, and Hog Quarter, N. C., and all contracts, rights and privileges it may have acquired from the Norfolk Southern Railroad Company for the operation of steamers and other vessels between Elizabeth City and Brinson's Landing and intermediate points, and also its good will, with a reservation of certain moneys accruing under said contract and the operation of the steamers prior to 16 July, 1911." There was a covenant against liens and encumbrances on the two steamers "arising on and after 12 December, 1910, and prior to 16 July, 1911," except an indebtedness of $8,333.33 to the Norfolk Southern Railroad Company, which the defendant was to assume and to receive credit for that amount on the purchase money, and the balance, $9,666.67, less $2,000 deposited with W. G. Gaither, Jr., was paid by defendant to the LeRoy Steamboat Company. The following is the stipulation between the LeRoy Steamboat Company and defendant, under which the deposit of $2,000 was made: "It is agreed that $2,000 of the purchase money of said steamers shall be deposited with some one, agreeable to both parties, to be held for thirty days for the payment of any liens other than those mentioned in section first ($8,333.33 indebtedness), on said two steamers, and which arose while said steamers were operated by the party of the first part (LeRoy Steamboat Company). At the expiration of thirty days from date, said $2,000, less such liens, if any, shall be paid to the party of the first part.

Plaintiff is receiver of the LeRoy Steamboat Company, and after paying to the plaintiff the sum of $1,000 and discharging the liens mentioned in the agreement to the amount of $360.14, he has in his hands the sum of $639.86, due to the plaintiff, unless the defendant is entitled thereto by reason of the claim asserted in its answer. This claim is based upon the allegation that the title to part of the real property which was sold, towit, the LeRoy wharf at Newbern's Landing, had failed and that J. H. LeRoy had duly recovered judgment in an action against defendant for the same, and defendant has been compelled to pay a large sum of money, exceeding $639.86 in damages and costs, in order to retain the said wharf. The defendant tendered the following issues:

1. Did the LeRoy Steamboat Company warrant the title to the LeRoy Wharf at Newbern's Landing, as alleged?

2. Did J. H. LeRoy recover the said wharf against the defendant, as alleged?

3. What damage did the defendant sustain thereby?

4. Did the title to the said wharf at Newbern's Landing absolutely fail, and was defendant ousted from its possession, as alleged?

5. What abatement in purchase price are defendants entitled to by reason of the same?

6. What credits are defendants entitled to by reason of liens paid?

The court refused to consider those issues, and, instead thereof, submitted the following issue to the jury:

"What amount, if anything, is due to the plaintiff of the $2,000 deposited with the defendant W. G. Gaither, Jr.?"

The jury answered $528.86. Judgment was entered in that amount in favor of the plaintiff, and the defendant excepted and appealed, assigning as errors the refusal to consider the issues tendered by it and the submission of the single issue as to the amount due to the plaintiffs.

Aydlett & Simpson for plaintiff.
Ehringhaus & Small for defendant.

WALKER, J., after stating the case: The contention of the defendant is, not that there was any express warranty as to the title of the "LeRoy Wharf at Newbern's Landing," but that the law implied a warranty of title, and as the defendant has lost that piece of the property conveyed to it by the LeRoy Steamboat Company, it should be compensated in damages and the money in the hands of the plaintiff should be applied to the payment of its claim, as defendant was legally—and if not, then equitably—entitled thereto. But the defendant's reasoning fails at its very inception. There was no covenant of warranty against the existence of liens or encumbrances as to any of the real property conveyed to it. Having omitted to have such a covenant inserted in the deed, the law will not imply one in its favor, but compel the defendant to abide by the terms of the contract as settled by the parties and expressed in their deed. "Covenants of title (in a sale of real property) are never implied. Consequently, in the absence of fraud or mistake, if a deed contains no covenant, all questions of title are at the risk of the grantee. If the title fail, he is without remedy, either at law or in equity, against the grantor." 11 Cyc., 1063, and cases in note 20. And so it is said in *Walsh v. Hall*, 66 N. C., at p. 237: "Where land has been sold and a deed of conveyance has been duly delivered, the contract becomes executed, and the parties are governed by its terms, and the purchaser's

only right of relief, either at law or in equity, for defects or encumbrances, depends, in the absence of fraud, solely upon the covenants in the deed which he has received. Rawle Covenants for Title, 459."

In *McKesson v. Hennessee*, 66 N. C., 473, it appeared that plaintiff in 1860 had purchased a tract of land from the defendant and taken a deed therefor in fee, but without any covenant of warranty or against liens or encumbrances. Defendant sued upon the note given by plaintiff for the purchase money and recovered judgment thereon, and plaintiff sought to enjoin him from enforcing it on the ground that the title had failed. Issues were submitted to the jury as to the state of the title and the damages if it was found to have been defective, but this Court held them to be irrelevant, as there was no covenant in the deed to protect the title, *Chief Justice Pearson* saying: "The complaint and answer both treat the deed of Nancy Hennessee to McKesson as a conveyance and not as an executory agreement to make title. It follows, there being no warranty or covenant of seizin, that the claim which the plaintiff seeks to set up has nothing to rest on. The legal effect of the deed was a quitclaim or release by way of extinguishment, and the finding of the jury was upon matter immaterial." It seems, therefore, to be settled now that at law, and even in equity, a vendee has no remedy on the ground of failure of title, if he has no covenants, and there is no fraud or mistake. *Chesterman v. Gardner*, 5 Johnson Ch. (N. Y.), 29; *Gouveneur v. Elmendorf*, *ibid.*, 79; *Snyder v. Laframboise*, 12 Am. Dec., 187, and note in Extra Annotated Edition at p. 191, citing *Dorsey v. Jackman*, 7 Am. Dec., 611; *Doyle v. Knapp*, 3 Scam., 334; *Owings v. Thompson*, *ibid.*, 505; *Slack v. McLagan*, 15 Ill., 242; *Sheldon v. Harding*, 44 Ill., 68, and other cases. See, also, *Maney v. Porter*, 3 Mumphreys (Tenn.), 346-363; *Botsford v. Wilson*, 75 Ill., 132. The Court said in *Sheldon v. Harding*, *supra:* "There can be no doubt that a quitclaim deed for land, without reference to the character of the title, is, in the absence of fraud, a sufficient consideration to support a contract; money paid for such a conveyance cannot be recovered back, or a plea of failure of consideration maintained to a note given for such a conveyance. Such deeds are made because the vendor is unwilling to warrant the title, and they are accepted because the grantee is willing to take the hazard of the title, and believes it is worth the price he pays or agrees to pay. And, unless fraud is practiced upon the grantee, the law permits such contracts to be made, and will uphold and enforce them. But where the vendee agrees to give a specific title he must do so whether there is fraud or not." It has been stated in some of the books that while no covenant of title will be implied from the mere fact of the conveyance of the land, one will be implied where it was evidently intended by the words of the instrument that it should be so, but this is but the usual inference permitted to be drawn from the language of

the parties, where their meaning is sufficiently certain and explicit to justify it. It is not a warranty implied by law from the conveyance. Besides, in this case, there is an express warranty or covenant as to liens or encumbrances on the steamers, excluding the idea that any warranty or covenant of other kind was intended as to the wharves, landings or other real property which was just as much subject to defects as the personal property. The deed, therefore, on its face and by its terms, as said in *Basnight v. Small,* 163 N. C., at p. 15, instead of strengthening the contention of defendant, refutes it, upon the familiar maxim, *"Expressio unius est exclusio alterius."*

The defendant contends, however, that the wharf at Newbern's Landing is personal property, and that there is always a warranty of title, though not of quality or soundness, implied in the sale of chattels; but we cannot agree that the first premise is correct. The wharf was built upon the land, or banks of the stream. The structure was permanently annexed to the land for the better enjoyment of the freehold and was manifestly intended to become a part thereof, although the vendee may not have an absolute fee-simple estate therein, but only a base, qualified, or determinable fee. The rule of the common law as stated by *Lord Ellenborough* in *Elwes v. Mawe,* 3 East, 38 (2 Smith's Leading Cases (9 Ed.), p. 1423), to determine what is a fixture as between vendor and vendee, is that "Whatever is affixed to the freehold becomes a part of it and passes with it," and he adds: "The rule is observed in its full vigor." Any accepted definition of a fixture, when applied to the admitted facts of this case, will lead us to the conclusion that this wharf is of that character, and passed as a part of the land to the vendee. It is in no legal sense personal property. *Pemberton v. King,* 13 N. C., 376; *Moore v. Valentine,* 77 N. C., 188; *Foote v. Gooch,* 96 N. C., 265; *Overman v. Sasser,* 107 N. C., 432; *Hopper v. Lutkins,* 4 N. J. Eq., 149; *S. v. Martin,* 141 N. C., 832, and especially *Basnight v. Small,* 163 N. C., 15, where it was held that a tramway consisting of rails fastened to cross-ties, which were laid on the ground, for the purpose of removing timber from the woods where it was cut, was a fixture, and so here, the wharves were built on the bank of the river and its bed, for the purpose of improving the landings and aiding in the carriage of articles of commerce from one landing to another. The analogy between the two cases is perfect. *Hopper v. Lutkins, supra,* which also clearly illustrates the doctrine, was a case where the purchaser of a mill-seat and water-power accepted his vendor's deed without any covenant for his protection, as to the height of the dam or the extent of the flow to which he is entitled, and afterwards was subjected to damages by reason of the improper height of the dam, and though this was a defect in his title to the full and free use of the water, the Court held that, without a showing of fraud or mistake, he was without any remedy against his

vendor, either in law, or even in equity, to enjoin a recovery on the note given for the purchase money.

In any admissible view of the facts, so far as considered, the ruling and judgment of the court were correct, but we may also go further and state, that the money was deposited with Gaither to discharge liens on the steamers alone, and not any on the land, nor is there any stipulation that any part of the fund should be applied to compensate defendant for any defect in the title to the other property conveyed. So that, apart from the above considerations, it would seem that defendant meets with an insuperable difficulty in the fact that such an application of the fund as it seeks to have made is not authorized by the agreement of the parties made, which we are not at liberty to alter. The purchase money on the "wharves, docks, piers, and landings," by clear inference, was paid over to the LeRoy Steamboat Company at the time the sale was consummated, and only $2,000 of that part applicable to the steamers was retained and deposited to pay off any liens upon them.

We affirm the judgment, as there is no error discoverable in the record.

No error.

F. B. NEWELL ET AL. v. ELLIS GREEN, GAME WARDEN.

(Filed 22 September, 1915.)

1. Taxation — Counties — Dog Tax — Licenses—Police Regulation—Constitutional Law.

A statute imposing a specified tax upon all persons owning or keeping a dog within a certain county is for the privilege of keeping the dog therein, and comes under the police regulations of the county. It is therefore constitutional and valid, and will not be restrained.

2. Same—Uniformity.

The constitutionality of a legislative enactment uniformly imposing a tax upon persons owning or keeping dogs within a certain county is not affected by the fact that the act does not apply to all counties of the State.

3. Taxation Distribution of Proceeds Legislative Discretion—Constitutional Law.

The distribution of the proceeds derived from the imposition of a tax is a matter within the discretion and judgment of the Legislature, and will not affect the constitutionality of the act.

APPEAL by plaintiff from *Ferguson, J.*, at chambers, 26 May, 1915, refusing to continue in force a restraining order.

Thomas M. Pittman for plaintiffs.
Tasker Polk and T. T. Hicks for defendant.

CLARK, C. J. This was a restraining order against the enforcement of chapter 90, Public-Local Laws 1915, entitled "An act taxing dogs in Warren County." The restraining order was dissolved and motion for injunction refused. Section 1 of the act provides: "That any person or persons owning or keeping or having a dog, claimed or owned by a minor or any other member of the family, must pay annually on each dog so kept a license tax or privilege tax of two dollars for each male dog and three dollars for each female dog."

The plaintiffs contend that the act is unconstitutional and void. The identical question was presented in *Mowery v. Salisbury,* 82 N. C., 175, when the Court, *Smith, C. J.,* delivering the opinion, held: "A statute empowering town authorities to require the payment of a tax on dogs is constitutional. It is not an *ad valorem,* but a specific tax, for the privilege of keeping a dog within the town, and if not paid by the owner, the dog may be treated as a nuisance and killed." *Mowery v. Salisbury* has been cited with approval, *Daniels v. Homer,* 139 N. C., 223; *S. v. Smith,* 156 N. C., 630.

We think the statute may be upheld upon the further ground that it is a police regulation. The evident purpose of the tax is to get rid of the worthless dogs which are likely to be a nuisance, killing sheep or otherwise, and to preserve those valuable enough for the owners to pay tax for and look after them. The owners will thus draw the line for themselves. Failure to list is made a misdemeanor.

In neither aspect is it necessary that the statute should apply to the whole State. In very many instances public-local acts "making that an offense in one district which is not so in another have been held a constitutional exercise of the police power, if the act bears alike on all persons within a defined locality, and within the discretion of the Legislature." *Broadfoot v. Fayetteville,* 121 N. C., 418, as to stock running at large, which cited as instances, local prohibition acts, *S. v. Joyner,* 81 N. C., 354; *S. v. Stovall,* 103 N. C., 416; *S. v. Barringer,* 110 N. C., 525; *S. v. Snow,* 117 N. C., 774; or restricting the sale of seed cotton in certain localities, *S. v. Moore,* 104 N. C., 714.

The same principle has been applied in many other cases: as to methods of working public roads, *Tate v. Comrs.,* 122 N. C., 814; local dispensaries for handling liquor, *Guy v. Comrs.,* 122 N. C., 471; fence laws, *S. v. Snow,* 117 N. C., 774; *Cain v. Comrs.,* 86 N. C., 8; local prohibition of cattle running at large, *Broadfoot v. Fayetteville,* 121 N. C., 418; local differences as to methods of electing town and city commissioners, *Harris v. Wright,* 121 N. C., 172; in the method of electing county commissioners, *Lyon v. Comrs.,* 120 N. C., 237; local provisions as to public schools, *McCormac v. Comrs.,* 90 N. C., 441; and other matters, *S. v. Sharp,* 125 N. C., 633; *Intendent v. Sorrell,* 46 N. C., 49; local acts as to gunning and fishing, *S. v. Gallop,* 126 N. C., 984;

Daniels v. Homer, 139 N. C., 219; *Jones v. Duncan,* 127 N. C., 118, and the acts fixing different seasons in different counties in which it is illegal to hunt. These matters are regulated according to the wishes and needs of different localities, and can be changed from time to time, giving a desirable flexibility of local self-government by legislative enactment. See summary *S. v. Blake,* 157 N. C., 610.

The plaintiffs further contend that the act is invalid because of the apportionment made by the act of the proceeds after the deduction of expenses. But that is a matter in the discretion and judgment of the Legislature. Even if the apportionment were invalid, that would not render the act invalid, or entitle the plaintiffs to a restraining order against payment of the tax. It would only affect the method of distribution. Even if this were a property tax and not a privilege tax or an exercise of the police power, the provision of the Constitution requiring uniformity applies to the levy of taxes and not to the distribution of the revenue derived therefrom. If this were not so, the courts have no machinery, or means, of correcting the legislative method of distribution when the tax itself, as we have held, is valid. This is fully discussed in *Holton v. Comrs.*, 93 N. C., 436, reviewed and approved in *Brown v. Comrs.,* 100 N. C., 98; *Tate v. Comrs.,* 122 N. C., 813.

The passage of the act was within the legislative power of the State. If, as counsel for the plaintiffs contends—to which counsel for the defendant earnestly dissent—this statute does not meet with the approval of the good people of the good county of Warren, that is a matter of fact for them to settle for themselves in electing members to the House and Senate to represent their interests and wishes in the General Assembly, and not a matter of law for the courts.

There seems to be a very widespread demand for a dog tax, as evidenced by the fact that the legislatures of 1909, 1911, 1913, and 1915 have authorized a dog tax in 36 counties, beginning with Wake County in 1909. The counties in which the dog tax is provided for are as follows: Alamance, Ashe, Avery, Camden, Caswell, Catawba, Chatham, Cleveland, Currituck, Durham, Forsyth, Gates, Gaston, Granville, Guilford, Halifax, Harnett, Haywood, Hoke, Mecklenburg, Mitchell (in Grassy Creek Township), Moore, Orange, Pamlico, Person, Pitt, Randolph, Richmond, Rockingham, Rowan, Rutherford, Union, Wake, Warren, Watauga and Wayne. And there are doubtless taxes upon dogs authorized in many towns and cities outside of the above counties. We are indebted for this information to Mr. W. S. Wilson, librarian of the newly established Legislative Reference Library.

Affirmed.

S. E. MARSH ET ALS. v. J. C. EARLY, TAX COLLECTOR, ET ALS.

(Filed 22 September, 1915.)

1. School Districts—Counties—State Agencies.

Counties are mere agencies of the State, and the Legislature has authority to create school districts solely in one or partly in two counties and abolish them at will.

2. Same—Enlarging and Reducing Districts—Taxation—Constitutional Law.

Where under legislative enactment a school district has been enlarged upon approval of its voters, a bond issue for school purposes favorably passed upon and taxes levied therefor and the collection thereof placed in the hands of a duly authorized collector, the collector may not be enjoined by the taxpayers living in the territory taken in, on the ground that the Legislature, by a subsequent act, has again restricted the district to its former limits, the taxes sought to be enjoined being those due before the latter enactment became effective.

3. Same—Back Taxes—Interpretation of Statutes.

Ch. 485, Private Laws 1913, extending the limits of Aulander School District to take in certain outlying territory, provided the proposition be favorably voted upon by the voters of the proposed district, and chapter 424 of the same laws, making the school district coterminous with the boundaries of the town, may stand together in their interpretation.

APPEAL by defendant from *Lyon, J.*, at the August Term, 1915, of HERTFORD.

Alex. Lassiter and Winborne & Winborne for plaintiffs.
Winston & Matthews for defendants.

CLARK, C. J. The town of Aulander, Bertie County, was incorporated by chapter 84, Private Laws 1885. By chapter 176, Private Laws 1905, the Aulander Graded School District was incorporated, the boundaries being the same as those of the town. By virtue of chapter 485, Private Laws 1913, ratified 27 February, 1913, the graded school district of Aulander was extended and made to embrace a part of the county of Hertford adjacent to the town, but by section 15 thereof its validity was made dependent upon the adoption by a majority of the qualified voters of said district of the bond issue and special tax, at the election therein directed to be held. Under the authority of that act the question of the special tax and bond issue was submitted to the voters of the new district 29 September, 1913, including the small portion of Hertford embraced in said district, and the proposition was adopted, the result legally announced, and the bonds issued and sold. To provide for payment of interest on the bonds and a sinking fund to meet the principal and other expenses set out in the act, the trustees levied taxes for the year 1914 and put their tax list in the hands of J. C. Early, who had been elected tax collector for the whole school district.

Before the collector had collected taxes from these plaintiffs the General Assembly, by chapter 287, Private Laws 1915, ratified 9 March, 1915, repealed so much of the act of 1913, Private Laws, ch. 485, which had placed the strip of Hertford County territory aforesaid within the area of the graded school district of Aulander. The plaintiffs live in that part of Hertford County which was thus taken out of the district. The tax collector had, by virtue of the tax list in his hands, levied upon personal property of these plaintiffs. This proceeding was a restraining order temporarily granted against the sale of said property. The parties filed an agreed statement of facts and thereupon the court granted a perpetual injunction against the defendants.

There are no restrictions in the repealing act, Private Laws, ch. 287 of 1915, and no saving clauses. The act merely says, "To take effect from ratification." The defendants are not seeking to collect any taxes except those for 1914, which were a lien upon the property of the plaintiffs and on the list in the hands of the collector when the repealing act was passed.

We are not called upon to pass upon the power of the Legislature to exempt the property of the plaintiffs from these taxes, which had already accrued before the passage of the act of 1915, and which were on the tax list of the collector at the time of the passage of such repealing act, if the Legislature had seen fit to so enact. Nor are we called on to decide what recourse, if any, the bondholders have against the residents of the excluded territory, and no point is made that the tax collector is not a resident of that part of Hertford County. Indeed, it does not appear whether he lives in that territory or in Bertie County, but merely that he was elected tax collector by the district including that area. He is not an officer of either Bertie or Hertford County, but of the district only.

The sole question before us is the construction and intent of the Legislature as expressed in chapter 287, Private Laws 1915, which excluded from the Aulander School District that portion of its territory which lay in Hertford County. It is not material, in any way, whether the territory thus withdrawn lay in Hertford or in Bertie. It was in the power of the Legislature to place such territory as it saw fit in the school district, and it could withdraw any of such territory, or add more thereto at will, for the counties are merely agencies of this State. *Tate v. Comrs.*, 122 N. C., 813; *McCormac v. Comrs.*, 90 N. C., 444.

This part of the territory of the school district which was afterwards withdrawn therefrom by the act of 1915, voted with the rest of the district on 29 September, 1913, on the issue of bonds and special taxes. It had received for the school children from that section, presumably, and so far as this record shows, all the benefits of the school for the

year 1914, for which these taxes were levied. Such being the case, we cannot impute to the Legislature the intention to relieve the plaintiffs from their share of the taxes incurred, and due before the repealing act of 1915 was passed, in the absence of any saving clause or exceptions indicative of such intention.

The language of the statute is that it shall take effect "from its ratification." That made the act prospective and not retroactive. From that day forward, the excluded territory was no longer a part of the Aulander School District, but there was nothing which exempted such territory from liability for the taxes already accrued and due, for which the citizens of that territory presumably had received their share of benefits. It would seem clear, therefore, that such liability being vested, the plaintiffs are not exempted therefrom in the absence of any expression of the legislative will to that effect.

There was also passed at the same session, with act above construed (chapter 485, Private Laws 1913), chapter 424, Private Laws 1913, ratified 10 March, 1913, which amended the limits of the town of Aulander and made the Aulander Graded School District coterminous. But there is nothing in this act which amends or repeals chapter 485, Private Laws 1913. The two acts can stand together, especially as chapter 485 was made prospective and dependent for its effect, as already stated, upon an election to be held in the new district, embracing the territory from Hertford, which election was held 29 September, 1913. Indeed, the plaintiffs do not raise this point in their brief, and the agreed state of facts, sections 8 and 7, recites that the plaintiffs are "proceeding to exercise the right of collecting the taxes levied for the year 1914, against the property and poll of all persons living within that part of Hertford County which prior to the passage of said repealing act (9 March, 1915) was within the limits and boundaries of the Aulander Graded School District."

The plaintiffs quote *Dare County v. Currituck,* 95 N. C., 189, that "The Legislature has the power to require that the part of the territory taken from a county shall continue to pay its proportionate part of the debt of the county from which it is taken, existing at the time of the separation; and it may likewise relieve them from such debt." This statute does not purport to relieve the plaintiffs from liability for the debt already accrued, and the restraining order should have been dissolved and the injunction denied.

If there had been any doubt as to the power of this tax collector it is set aside by chapter 26, Laws 1915, which provides: "All sheriffs and tax collectors who, by virtue of their office, have had the tax lists for the purpose of collecting the taxes of their respective counties and towns and school district in their hands for the years 1911, 1912, 1913, and 1914 . . . are hereby authorized and empowered to collect

arrears of taxes for each of the years aforesaid." The power of the Legislature to so provide is beyond question. *Wilmington v. Cronly*, 122 N. C., p. 383, and cases there cited, and citations thereto in Anno. Ed.

Reversed.

W. B. AND C. L. MORTON v. WASHINGTON LIGHT AND WATER COMPANY.

(Filed 22 September, 1915.)

1. Water Companies—Fire Damages—Evidence—Comparative Values—Appeal and Error.

Where a water company negligently fails in its duty to supply water to extinguish the burning of the plaintiff's house, it is reversible error, to the plaintiff's prejudice, to admit evidence of the comparative value of the house with cost of one he has subsequently erected, and to instruct the jury thereon, tending to diminish the damages recoverable; for the inquiry is confined to the damages done by the fire.

2. Fire Companies—Fire Damages—Measure of Damages—Insurance—Appeal and Error.

Where the defendant water company is liable for its negligence in failing to supply water to extinguish the plaintiff's store and stock of merchandise therein, the former insured in a certain sum and the latter not insured, it is reversible error for the trial judge to instruct the jury to deduct the amount of the insurance from the total loss, when the effect may be to deny the plaintiff any recovery for damages sustained by reason of his uninsured stock of goods.

3. Appeal and Error—Retrial—Restrictive Issues—Measure of Damages—Burden of Proof.

Where on appeal to the Supreme Court in an action to recover damages, a new trial is granted restricting the inquiry as to the amount thereof, it is reversible error for the judge at the retrial to put the burden of proof on the plaintiff to show that the alleged negligence of the defendant was the proximate cause, which had formerly been determined.

4. Instructions—Evidence—Appeal and Error.

A charge to the jury, in an action to recover fire damages to property, on the issue as to the quantum of damages, that, according to the plaintiff's evidence the property was valueless, is reversible error in the absence of such evidence.

5. Instructions—Statement of Contentions—Tax Values—Appeal and Error.

In this action to recover damages by fire to improvements on real property, a statement of the defendant's contention made by the trial judge, in his charge, that the property was listed at a certain sum, and that plaintiff had sworn that this sum was the true value, constitutes reversible error to the prejudice of the plaintiff, when his testimony fixed its value at a greater sum, the valuation of such property being fixed by the board of assessors, and the statement tending to mislead the jury.

APPEAL by plaintiffs from *Harding, J.*, at May Term, 1915, of BEAUFORT.

Daniel & Warren and A. D. McLean for plaintiffs.
W. B. Rodman, Jr., for defendant.

CLARK, C. J. At last term, in this case, *Morton v. Water Co.*, 168 N. C., 588, this Court granted a partial new trial restricted to the issue as to damages. By consent the case of C. L. Morton was consolidated with that of W. B. Morton & Co. C. L. Morton is asking damages for the destruction of his building and of certain personal property by the fire, which the defendant wrongfully and negligently failed to furnish sufficient water to extinguish, and W. B. Morton is asking damages by the same fire on account of the destruction of a stock of goods in the same building, which were carried for sale, and display fixtures, such as are carried in furniture stores. C. L. Morton had $4,000 insurance on his building and no insurance on the personal property, for which he sues. W. B. Morton & Co. had $1,000 insurance on the stock of goods for sale and no insurance on the display fixtures, which he values at $400. The jury assessed the damages in favor of plaintiff C. L. Morton at $600, and the damages in favor of the plaintiff W. B. Morton & Co. at $738, and both assigned error and appealed.

Exceptions 1, 2, 3, 4, 5, 8, and 9 are to the admission by the court of evidence contrasting the value of the new building with the old. Exception 16 is to the charge of the court, which submitted to the consideration of the jury a contrast of the value of the two buildings based upon the above evidence.

It seems to us that these exceptions are well taken. The plaintiff was suing for damage to the building that was destroyed by fire. The defendant's theory, based on the above evidence and charge, was that the plaintiff had erected on the lot since the fire a more valuable building than the old one, and that therefore he was not damaged by the fire. The cost of doing this was irrelevant. If the plaintiff had seen fit to erect in the place of the old building a cheaper one, this would not have enhanced the plaintiff's damage. Nor could the fact that he had erected a more valuable one, if he did so, reduce the damages. It may be that he made a good bargain in getting the new building erected cheaply, or a bad bargain in getting it erected at too great a cost. The insurance company, or the defendant might have put back the building. Not having done so, the sole question is, "What was the value of the building that was destroyed?"

We think, also, there was error in permitting the jury to deduct from the damages sustained by C. L. Morton, $4,000, the amount of his insurance on the building, when there was evidence tending to show that he lost by the fire $1,228 worth of personal property, on which he had no insurance. This is presented by exceptions 12, 15, 17, 21, 27, and 28.

The court in effect told the jury to ascertain the total amount of dam-

ages which the plaintiff C. L. Morton had sustained, and then deduct from it $4,000, the amount of insurance which he had received, and the difference would be the damages which he should be allowed. If the jury had found that the damages to the plaintiff's building and personal property together did not amount to more than $4,000, subtracting the $4,000 insurance would leave no damage; whereas there was evidence, if believed, that C. L. Morton had no insurance whatever on $1,228 worth of personal property, which he sued for as a distinct item and for which he was entitled to recover damages. The jury seems to have thus understood the judge's charge, for they gave C. L. Morton only $600 damages, when, if they had believed his evidence, he was damaged $1,228 by loss of the personal property independent of the building, if it be conceded that the building was fully covered by insurance.

Exceptions 10, 11, 18, and 26 are that the court erred in placing on the plaintiff the burden of showing that the negligence of defendant was the proximate cause of plaintiff's injury. The issue of defendant's negligence and the proximate cause of the injury was submitted to the jury on a former trial, and on appeal the finding on these issues had been sustained and the new trial was granted only as to the *quantum* of damages.

Exception 13 is to the statement of the court in the charge that the plaintiff contended that on the evidence the property was worth by his evidence $12,000 to $15,000, whereas the plaintiff says that his evidence shows that the property before the fire was worth from $18,000 to $20,000, and exception 19 is that the court stated in its charge that there was some evidence tending to show that the personal property was not worth anything, when there was no evidence to that effect. We think also that there was error in this respect.

Exception 28 is that the court stated to the jury that the property was listed before the fire for taxation at $5,778, and that the defendant contends, as the plaintiffs had sworn that this was the true value of the property, the jury should find that amount to be correct. This charge, though it states the matter as the defendant's contention, might well have misled the jury, because, as the plaintiff testified and as a matter of law, the owner of real estate does not assess his real property, but the valuation is affixed by the board of assessors.

The plaintiff W. B. Morton assigns as error in exceptions 21, 22, and 23, that the charge of the court ignored the evidence that he had $400 worth of goods, consisting of display fixtures, on which there was no insurance. The court, it seems, made the same error, as above stated, in regard to the plaintiff C. L. Morton, by telling the jury in effect that they were to ascertain the value of the property destroyed and deduct from it the sum of $1,000 insurance and make the difference their answer, whereas there was evidence that there was this $400 worth of prop-

erty not covered by insurance at all, whose value the plaintiff was entitled to recover, regardless whether the other property was fully covered by insurance. The plaintiff W. B. Morton further excepts, 23 and 24, that the charge of the court commits the same error by taking away from the jury the consideration of the value of these display fixtures on which there was no insurance, but for the value of which he was entitled to recover.

For these errors there must be a new trial on the issues as to damages. New trial.

WALKER, J., concurring: I adhere, in every respect, to the view I held when this case was here before (168 N. C., 588), as expressed in my dissenting opinion, concurred in by *Justice Hoke,* and I still think that the plaintiff is not entitled to recover at all; but as a majority of the Court were of the opposite opinion, and the law as they stated it became, as it is called, the rule of this particular case, I waive further dissent, upon that ground alone, and concur in the result as to the questions now presented. I am authorized to say that *Justice Hoke* concurs in this opinion.

HOKE, J., concurring.

BLUE RIDGE INTERURBAN RAILWAY COMPANY v. HENDERSONVILLE LIGHT AND POWER COMPANY ET AL.

(Filed 22 September, 1915.)

Water and Water Courses—Water Powers—Interurban Railways—Easements—Condemnation—Interpretation of Statutes.

Chapter 74, Laws 1907, amended by chapter 302, Laws 1907, authorizes street and interurban railway companies, under certain conditions, to acquire by condemnation, in the manner provided for railway companies, water rights or other easements which are necessary to fully develop their water power on unnavigable streams flowing by their lands, etc., which is further amended by chapter 94, Laws 1913, with proviso that this right shall not extend to any water power, right or property of any person, firm or corporation engaged in the actual service of the general public, where such power, right or property is being used or held to be used or developed for use, or in connection with or in addition to any power actually used by such person, firm or corporation serving the general public. *Held,* a public-service corporation, chartered by name of interurban railway, owning lands on one bank of an unnavigable stream, cannot condemn across the stream and take the water rights held in the stream by another such and adjoining public-service corporation, when it appears that the defendant holds its lands across the stream for the further use of supplying power to operate its electric light and power plant, with which it is supplying such light and power to its patrons; and where there is evidence tending to show the existence of such facts, the question is a mixed one of fact and law for the determination of the jury; and the refusal of the trial judge to submit appropriate issues thereon is reversible error. *R. R. v. Oates,* 164 N. C., 172, cited and approved.

BROWN, HOKE, ALLEN, and WALKER, JJ., concurring in the result.

APPEAL by defendant from *Webb, J.*, at November Term, 1914, of HENDERSON.

Smith & Shipman, Tillett & Guthrie for plaintiff.

Staton & Rector, Charles F. Toms, J. W. Keerans, Michael Schenck, for defendants.

CLARK, C. J. This is a proceeding by the plaintiff to condemn the one-half interest of the defendants in the water power in question. It is admitted that the line between the two runs to the middle of the stream, the plaintiff owning one-half of the bed of the stream on the south side and the defendants owning the half of the bed of the stream on the north side, for half a mile.

It was suggested for the plaintiff in the outset of the argument that this was not a water power. If so, certainly the plaintiff has no right to condemn it, for it is not seeking to take the bed of the stream, nor the water as a right of way. Besides the complaint alleges that plaintiff needs it for the water power.

Neither can we give any weight to the suggestion that the interest of the defendants in this water power is too evanescent and intangible for it to object to the plaintiff taking it away, for the plaintiff admits that it offered $1,000 for the defendants' interest and that it refused an offer from the defendants of $40,000 for its own interest in the power. Indeed, the jury say the value of defendants' share in the water power is $10,000, and the plaintiff is seeking to force the defendants to take that sum for its interest.

This is too serious a matter and too important to be minimized. In view of the not distant exhaustion of the coal measures of the country, these sources of heat, and already almost the sole source of artificial lighting, are a matter of the gravest concern to Government and people.

The effort of this plaintiff to take water power from these defendants was settled in the litigation between these same parties, *R. R. v. Oates*, 164 N. C., 169, and this is practically an attempt to reverse that decision in an action over this property. It may be observed that if the plaintiff could take the defendants' interest in this proceeding there is no conceivable reason why the defendants are not equally entitled to take the plaintiff's interest.

The defendant light and power company was chartered in 1904 to supply light and power to the people of Hendersonville and surrounding country. It puts in evidence that it bought and holds this power for development and use as a necessary auxiliary to its other two powers, having purchased this power for that purpose. Its tract on the north side at this place, called "The Narrows," on Green River, extends for half a mile, with a fall of 218 feet, through which the water pours with

great velocity, capable of furnishing water power of perhaps 2,700 h. p., though the witnesses naturally vary in their estimates. The plaintiff company was organized in South Carolina and as a manufacturing company, but finding it could not condemn water power in North Carolina unless it was a corporation of this State and, under the act of 1907, an interurban railroad also, it later took out incorporation here as an "interurban railway."

The public policy of a State is defined by its legislature. Probably the most feared combination to be guarded against is the acquisition of the water powers of the country by one or more great aggregations of capital, which in view of the certainty of the exhaustion of our coal measures at no distant date will give such monopolies the full control of light, heating and power, and with them domination over the very means of existence of the public. With that view, the General Assembly of this State, in conferring the power of condemnation on telephone and electric light and power companies by ch. 74, Laws 1907, inserted a *proviso:* "Water powers, developed or undeveloped, with the necessary land adjacent thereto for their development, shall not be taken." To meet this provision, the influences behind these great aggregations of capital were powerful enough, it seems, to procure later at that session the enactment of ch. 302, Laws 1907, which authorizes street and interurban railway companies, "whenever such company shall not own the entire water front, or all the lands, water rights, or other easements which may be needed to fully develop such water power," to buy same; with further provision that if the company could not agree with the owner for the purchase of such lands, water rights and other easements, the same might be condemned in the manner provided for railroads. The adroit purpose of this alternative probably passed unperceived.

When this same point was presented between these same parties, *R. R. v. Oates,* 164 N. C., at p. 169, the Court said: "It would therefore seem that if a company needed a water power to produce electric power, and styled itself an electric and power company, it could not condemn the water power of another for that purpose. Ch. 74, Laws 1907. But if it styled itself 'a street and interurban railway company,' and should 'own land on one or both sides of the stream which can be used in developing water power,' it might have condemned the additional lands 'needed to fully develop such water power,' ch. 302, Laws 1907. In *Power Company v. Whitney,* 150 N. C., 34, it was held that water powers could not be condemned in this State, it being against our public policy as declared by ch. 74, Laws 1907. While matters were in this state, the Legislature enacted ch. 94, Laws 1913, which was entitled 'An act to amend chapter 302, Laws 1907, relating to the right of eminent domain.' The amendment consisted in the addition to the said chapter 302, sec. 1, Laws 1907, of the following words: *'Provided*

further, that such company or companies shall not have the power to condemn any water power, right or property of any person, firm or corporation engaged in the actual service of the general public, where such power, right or property is being used or held to be used or to be developed for use, or in connection with, or in addition to any power actually used by such persons, firms or corporations serving the general public.' "

It appearing in that case, as it does in this, that this particular property was held to be used and developed in connection with and in addition to the power actually used by the defendant light and power company in supplying electric lights and power to Hendersonville and surrounding country, this Court held that judgment should have been entered for the defendants.

In this new proceeding the plaintiff seeks to evade that decision by setting up the plea that the defendants cannot use or develop one-half interest in said water power, and therefore the plaintiff is entitled to condemn the same and take the whole of it for its own use. If this were true, the defendants would have equal right to condemn the plaintiff's half interest in the property for their own use, the more especially as the plaintiff offered the defendants only $1,000 for their half interest and the defendants offered the plaintiff $40,000 for its half interest, which the plaintiff admits that it declined.

In *R. R. v. Oates*, 164 N. C., at p. 172, the Court said, as to condemning water power, "The matter turns, therefore, on the question whether under the terms of ch. 94, Laws 1913, the land in question is subject to condemnation," and the Court further held that it could not be condemned if it was "held to be used or to be developed for use in connection with or in addition to any power actually used."

On this trial the court submitted the following two issues to the jury:

(1) Are the water powers, rights and properties on the land of the respondents, as described in the petition, capable of being developed for the production of electric power for use in connection with and in addition to the electric power already developed and in use by the respondent Hendersonville Light and Power Company?

(2) Are the water powers, rights or properties on the land of the respondents, as described in the petition, being held by the respondent, Hendersonville Light and Power Company, to be used and to be developed for use in connection with or in addition to any power now actually used by the said respondent, Hendersonville Light and Power Company?

There was much and conflicting evidence on these propositions, and the defendants were certainly entitled to have these issues submitted to the jury. The defendants could not be deprived of their property without due process of law and according to the law of the land. They had the right to have these issues of fact found by a jury, and upon such findings the court should have imposed judgment of law, subject to

review on appeal. The court, however, withdrew this right from these defendants and directed the jury to answer both issues against them.

The defendants offered full evidence that the water could be divided by a dam extending halfway across the stream, then up the middle of the stream. It is a self-evident proposition, not requiring evidence, that such a dam would ordinarily allow more water to go down the plaintiff's side, as that would be without an obstruction, while on the defendants' side the water might be ponded back. But in a stream like this, falling 218 feet in half a mile, such a dam would accurately divide the water, provided the stream is the same depth all the way across, and if not, a mathematical calculation would regulate the location of the dam to make an even division.

This is not a navigable stream, and the defendants, owning to the bed of the stream, could build a dam all the way up on their line. To do so would throw no water on the plaintiff's side and take none from it. Neither would there be this effect if the defendants built their wing dam on their line only part of the way. Above the commencement of the wing dam and below its end the water would be unaffected. For the space of the wing dam the cross dam to its lower end would pond the water on the defendants' side, but would in no wise affect its height either by raising or lowering it on the plaintiff's side. The defendants do not propose to take one drop of water out of the stream, but merely to take out of it that intangible, invisible, imperceptible power known as the force of gravity which by turbine wheels or otherwise will generate the electricity which will run their street cars, electric lights and heating in the town of Hendersonville, and will enable them to execute their contracts.

This division of the water of a stream by wing dams without in any wise lowering or raising the water in the plaintiff's half of the stream is a matter of common knowledge. In the evidence in this case the witness Seaver tells of two such developments near Waynesville in this State. The witness Sherrer also tells of a similar development in Caldwell County. Both of these witnesses were experienced engineers and found by the court to be experts.

In the "Official Electrical Directory of the United States" there are named many "wing-dam developments" of water power in one-half of the stream, among them the famous Keokuk plant on the Mississippi at Keokuk, Iowa, developing in this manner 200,000 h. p. Another is at McCall's Ferry on the Susquehanna River, which furnished all the power for Baltimore, Md. At Minneapolis, Minn., is the similar well known development of power on either side of the river for Minneapolis and St. Paul. Another is at St. Croix, Wisconsin, where half the power is on the Minnesota side and the other half on the Wisconsin side. Likewise, there is a similar development at International Falls, Minne-

sota, where the Canada half is operated on the Ontario side and the other half in Minnesota. The most striking instance, however, is the development of water power on both banks of the Niagara River.

The defendants offered evidence that their offer of $40,000 for the plaintiff's half was *bona fide* and that they wished to use the entire 2,700 h. p. if the plaintiff would sell, and if it would not, that the 1,350 h. p. on their own side is an absolute necessity to enable them to carry out the contracts already made, for which their other plants were insufficient unless they had the aid of their half interest in this power.

In *Power Co. v. Navigation Co.*, 152 N. C., 472, the objection was made by the lower proprietor against the upper proprietor on the same side, that the water was diverted out of the stream by a canal which carried the water behind the lower proprietor's mill and emptied into the river several miles below, thus, as the lower proprietor claimed, reducing the quantity of water which could have been utilized for running his own mill lower down on the same side with the defendant's intake.

Here the plaintiff and defendants are opposite owners and the defendants are only seeking to place a dam on their line in the middle of the stream curving back to the bank by which they will not take any water out of the stream, but will take the half which comes down their side of the dividing line, conduct it by a flume to the turbines which will take out the intangible force that by means of the turbine will generate electricity, thus leaving the water on the plaintiff's side of the stream at no time higher or lower than it would be without the dam on the dividing line. The plaintiff contends that this can not be done. The defendants offered evidence that it could be, giving the opinion of expert engineers who testified as to many places in which this is being done. The matter should have been submitted to the jury as an issue of fact.

The defendants, as riparian owners on one side of the stream, had the right to make a reasonable use of the water on their side, either for domestic or manufacturing purposes, and whether their proposed use would be unreasonable was a question for the jury to determine under all the facts and circumstances. If the jury should find, upon the evidence, that the defendants' half of the water power could be used as they propose, to generate electricity without building entirely across the stream, then this water power was specifically exempt from condemnation by ch. 94, Laws 1913. It was so held in the litigation between these same parties in *R. R. v. Oates*, 164 N. C., 170.

The question whether the use made by the riparian owner of the water of a stream upon its own riparian land is a reasonable use is one of fact and not of law. *Prentiss v. Geiger*, 74 N. Y., 341; *Bullard v. Mfg. Co.*, 77 N. Y., 525; Gould on Waters, sec. 220; *Dumont v. Kellog*,

18 Am. Rep. (Mich.), 102); *Hayes v. Waldron,* 84 Am. Dec. (N. H.), 105; *Merryfield v. Worcester,* 14 Am. Rep. (Mass.), 592; *Ulbritch v. Water Co.,* 4 L. R. A. (Ala.), 474. A riparian owner may temporarily retain water by dams in order to furnish power to run machinery, when the amount is reasonable (*Pierson v. Spyer,* 12 Am. St. (N. Y.), 499), and there are very numerous other cases with which the books are filled.

The defendants asked the court to charge: "If the stream, Green River, in its entirety within the land described in the petition, and the land adjoining said stream on the opposite side thereof, constituted a water power, then one-half of said stream, being an integral part of said water-power right or property, would not be subject to condemnation, and you will answer the second issue 'Yes.'" Under chapter 94, Laws 1913, and the decision in *R. R. v. Oates,* 164 N. C., 167, it was error not to give this instruction. In any aspect it was error for the court to take the issue from the jury and to answer it himself.

The defendants further requested the court to charge: "The entire stream, Green River, along the water front of the respondents' land is a water power, and if the one-half of said stream owned by the defendants is condemned for the use of the plaintiff, then the value of said one-half should be taken into consideration in estimating the amount of damages to which the defendants are entitled, as well as all the other facts and circumstances tending to show the value of the proposed water-power development of the plaintiff, of which development the lands of the respondents form an integral and necessary part, according to the contentions of the plaintiff."

If the plaintiff had been legally entitled to condemn the water-power of the defendants at all, this prayer should have been given. The court, however, refused to so charge, and instructed in lieu thereof, that "the defendants would only entitled to the present value of their 76 acres of land, lessened by reason of the diversion of the water which the plaintiff seeks to take," saying, in effect, in his charge, that the defendants were not entitled to the value of the water-power which was to be taken from them by the "strong arm," but they were only entitled to the diminution in the value of their land by the plaintiff's taking one-half of the water from the stream.

The result of this charge is practically shown by the fact that though the defendants had offered the plaintiff $40,000 for its half interest in the water-power, and the plaintiff admitted on the stand that it had declined that offer, and would not take it, the jury assessed the value of the defendants' damages by reason of its half being taken from them by the plaintiff at $10,000—a patent loss of at least $30,000, and, according to their evidence, very much more damage than this was inflicted upon these defendants, who would be prevented from filling their contracts.

The defendants also requested the court to charge: "If the jury should find from the evidence that the stream, Green River, in its entirety between the land described in the petition and the land of the petitioner on the opposite side of the stream contains a water-power capable of development, and that such development when made has a market value, then it would be the duty of the jury, in estimating the compensation to be awarded the defendants for the condemnation for their lands, to consider the value of such development to which such water-power may be adaptable; and if the jury should find that the respondents owned one-half of the water-power capable of development, then it would be the duty of the jury to award as compensation to the defendants for the taking of their land or water rights one-half the value of such water-power capable of such development."

This proposition is so clear that no argument should be required. The defendants were certainly entitled to the value of the property which was taken from them, and under certain circumstances they were entitled to more than the above measure, because if, as their testimony shows, this water-power was necessary to enable them to execute the contracts which they had taken, or proposed to take, in furnishing light and power, the loss of this power might inflict a much greater loss upon them by reason of the disability thus inflicted upon them, for it may well be that there is no other water-power of ready access which they can acquire for their purposes at the same price.

The right of the defendants to the use of the water along their frontage, provided only they returned the water to the stream in undiminished quantity before it reaches the next lower proprietor, is fully recognized in the very full discussion by *Walker, J.*, in *Power Co. v. Navigation Co.*, 152 N. C., 472, and that is all the defendants propose. They will not divert the water itself out of the stream beyond their lower line. They will merely transmit the power generated by the weight of falling water over cables to their other plants, but the water itself will pass on in undiminished volume. If not, it will be for the lower proprietor to complain. The plaintiff, the opposite proprietor, cannot object so long as the defendants do not use in generating power more than half the water. This is not a navigable stream.

The defendant, the Hendersonville Light and Power Company, is engaged in serving the general public, and holds its half interest in this property for development in connection with its other plants. In the former case between these parties, 164 N. C., 167, this Court told this plaintiff that it could not take water power from the defendants except with their consent, by purchase. It can make no difference that the defendants own only one-half of the power instead of the whole. The plaintiff could not condemn one-half of a graveyard or half a dwelling-house, because it or some one else owned the other half, and, for a

stronger reason, because it is against public policy, the plaintiff cannot take the defendants' half of this water-power, especially when the plaintiff has refused to sell its own half to the defendants at four times the price for which it seeks to make the defendants yield their half.

Upon the face of the complaint the plaintiff is endeavoring to take the property of the defendants and devote it for their own benefit to the very same purpose for which the defendants are holding it, *i. e.*, for the development of a water-power for public use. This cannot be done. 2 Lewis Em. Dom. (3 Ed.), 400.

In refusing to submit the issues to the jury there was

Error.

Brown, J., concurring in result: All the evidence in this record is to the effect that the property sought to be condemned by plaintiff is a water-power owned jointly by plaintiff and defendant as opposite riparian owners. I do not think the water can be legally divided except by mutual consent of both owners, as that would be to greatly diminish the value of the power as a whole.

In this respect I think the law is correctly stated in the concurring opinion of *Mr. Justice Allen.* It may be that in the case of very large, powerful and navigable streams, such as the Mississippi, the Niagara, and others, and under the authority of special local statutes, such division and diversion of the water may be both practicable and legal. But no such conditions exist here.

I concur in the judgment of the Court submitting a proper issue to the jury to determine the fact as to whether the defendant is using or holding this water-power to be used or developed for use in connection with or addition to any power actually used by it.

An examination of the authorities convinces me that the opposite riparian owner cannot be permitted to build a dam to the middle of the stream and divert the water through a flume, to the injury of the opposite riparian owner. If the water can be utilized in no other way, then it is not such water-power that, under the statute, is not subject to condemnation.

Hoke, J., concurring: Our statute, in permitting water-powers to be condemned for public use, withdraws from the effect of the law any water-power which is being used or held to be used or to be developed for use in connection with or in addition to any power actually being used for public service," etc.

There is evidence in the record tending to show that defendant is the riparian owner of land on one side of Green River, where there is a considerable fall in the stream, giving promise of a good water-power, if properly developed. The officials of the company testify, further, that

defendants purchased and now hold this property with a view to aid their power already developed, and now being used under a charter for the benefit of the public; that they have great need of such undeveloped power and propose to utilize the same as contemplated and provided by the statute.

Whether they can carry out their purpose and utilize this power in substantial aid of the power already developed, and without unwarranted interference with the rights of plaintiffs, who own along the opposite bank, is, in my opinion, a mixed question of law and fact, and, on the record, requires that the issue be submitted to the jury.

Allen, J., concurring in result: The water right or property of the defendant, as riparian owner, is subject to condemnation, unless it is "being used or held to be used or to be developed for use in connection with or addition to any power actually used by" the defendant, within the meaning of the proviso to chapter 302, Laws of 1907, as amended by chapter 94, Laws of 1913 (being section 2575 of Gregory's Supplement), and I doubt if there is any evidence of this fact, but as the other members of the Court are of a contrary opinion, and no legal principle is involved in this question, I concur in the judgment ordering a new trial.

I do not think the defendant has any property in the water in the stream, and that it is only entitled to a reasonable use of it *as it passes his land*, which may include the use for manufacturing purposes.

The defendant has no right, in my opinion, to build a dam to the middle of the stream and divert half the water through a flume, although he may return it into the stream one-half mile below, before it leaves his land, and if this is the only way the water can be utilized, it is not a water right or property which cannot be condemned under the statute.

The common law determines, with us, the rights of riparian owners in a stream of water flowing through their lands, and the controlling principles are, I think, correctly stated in Angell on Water Courses, sec. 100, as follows:

"Whenever a water course *divides two estates*, the riparian owner of neither can lawfully carry off any part of the water without the consent of the other opposite; and each riparian owner is entitled, not to half, or other proportion of the water, but to the whole bulk of the stream, undivided and indivisible, or *per my et per tout*. To use the language of *Platt, J.*, in *Vandenburg v. Vanbergen*, in New York, . . . 'The grant of an *undivided share* in a stream would not authorize the grantee to appropriate or modify the stream to the injury of others who have a joint interest in it. The property in a stream of water is *indivisible*. The joint proprietors must use it as an entire stream in its natural channel; a severance would destroy the rights of all. In

Blanchard v. Baker, in Maine, the defendants, who had their dam on the side of the stream opposite to the plaintiff's dam, contended that they had a good and legal right to one-half of the water in the main stream, and to carry it off by deepening an ancient outlet or canal. . . . . It was held that the defendants had not a right to one-half of the water in the main stream of the river, so as to abstract it by means of the channel in question. The Court said, in reply to the suggestion, that the owners of the dam on the eastern side of the river had a right to half the water, and *to divert to that extent:* 'It has been seen, that if they had been the owners on both sides, they had no right to divert the water, without again returning it to its original channel. Besides, it was impossible, in the nature of things, that they could take it from their side only; an equal portion from the plaintiff's side must have been mingled with all that was diverted."

The following authorities support the text: *Pugh v. Wheeler,* 19 N. C., 50; *Durham v. Cotton Mills,* 141 N. C., 624; *Harris v. Railway Co.,* 153 N. C., 544; *Webb v. Portland Mfg. Co.,* 3 Sumner, 200; *Plumleigh v. Dawson,* 6 Ill., 550; *Parker v. Griswold,* 17 Conn., 300; *Carpenter v. Gold,* 88 Va., 553; *Vandenburg v. Vandenburg,* 13 Johns, 217; *Blanchard v. Baker,* 8 Me., 266; *Davis v. Getchell,* 79 A. D., 636; *Newhall v. Ireson,* 54 A. D., 790; Farnham on Waters, vol. 2, sec. 464, *et seq.;* Gold on Waters, sec. 204, *et seq.*

The language in the statute, "held to be used or to be developed," means more than a mere mental operation, and at least conveys the idea of capacity for use or development.

I do not attach any importance to the proposition of the defendant to pay the plaintiff $40,000 for its water right on the opposite side of the stream, conceding it to have been made in good faith, because it has no bearing on the legal questions involved and on the record is much like offering to buy the middle link in a chain without purchasing the chain.

Walker, J., concurs in the opinion of Allen, J.

C. C. N. CUTLER v. MARY H. CUTLER ET AL.

(Filed 22 September, 1915.)

1. Arbitration and Award—Lands—Contracts in Writing—Description.

An agreement to arbitrate a matter in dispute must be in writing when relating to the title to land, and describe the land with reasonable particularity, in order for it to be binding or enforcible.

2. Arbitration and Award—Contracts—Agreement—Scope of Powers—Ultra Vires Acts—Estoppel.

Arbitrators derive their power to act from the contract or agreement of the parties to arbitrate, and when such is sufficient for them to ascertain or determine which of the contesting parties is the owner of the title to land, and this question alone is submitted to them, an award finding or recommending that one of the parties should pay the other a certain sum of money, whereupon the other should convey the title to him, is not within the terms of the agreement, but, in effect, an attempt to compromise, and therefore, being void, will not estop the parties in an action subsequently commenced.

APPEAL by defendants from *Harding J.*, at the May Term, 1915, of BEAUFORT.

This is an action to recover land, tried on the following agreed statement of facts:

1. That the plaintiff is the owner and entitled to the possession of the six acres of land described in section 4 of the complaint, conveyed to him by R. O. Gurganus, unless he is estopped and barred of recovery of same by reason of the facts hereinafter set forth.

2. That on 7 February, 1913, the plaintiff and defendants, other than the Kugler Lumber Company, entered into an agreement, a copy of which is hereto attached, marked Exhibit "A."

3. That thereafter on 3 March, 1913, the arbitrators named in the agreement, referred to in section 2, rendered the following report, a copy of which is hereto attached and marked Exhibit "B."

4. It is agreed that if the court be of the opinion, on the foregoing statement of facts, that the plaintiff is not estopped and barred of recovery by reason of the matters herein agreed to, then it shall enter judgment declaring the plaintiff the owner in fee of the land above referred to; but if the court is of the opinion that the plaintiff is barred of his right to recover, then it shall enter judgment declaring the defendants the owners in fee of said land, subject to the payment to the plaintiff by the defendants (of) the sum of $235, with interest thereon from 3 March, 1913, until paid, which sum shall be declared a lien upon said land until paid.

(Signed) DANIEL & WARREN,
Attorneys.
WARD & GRIMES,
Attorneys for Defendant.

EXHIBIT "A."

NORTH CAROLINA—Beaufort County.

This agreement, made and entered into this 7th day of February, 1913, between C. C. N. Cutler, of the one part, and Reading Cutler, guardian of Arthur R. Cutler, of the other part:

Witnesseth: That whereas a controversy has arose between the parties above named over the title to a certain tract of land, and whereas they have agreed to submit the facts to Thomas E. Harvey and John B. Respass as arbitrators:

Now, therefore, we do hereby agree to abide by the decision of the said arbitrators, and do bind ourselves, heirs and assigns, by signing the same.

In testimony whereof we have set our hands and seals.

C. C. N. CUTLER. [SEAL]
ARTHUR R. CUTLER. [SEAL]
READING CUTLER, [SEAL]
Guardian for Alfred W. Cutler.

Witness: H. A. CUTLER.

EXHIBIT "B."

NORTH CAROLINA—Beaufort County.

To Mr. C. C. N. Cutler, Arthur R. Cutler, and Alfred W. Cutler, through his guardian, Mr. Reading Cutler.

GENTLEMEN:—After due consideration, we, the undersigned arbitrators, selected by you jointly, beg to submit the following as our report:

That Arthur R. Cutler and Alfred W. Cutler through his guardian, Reading B. Cutler, shall pay to C. C. N. Cutler the sum of two hundred and thirty-five dollars ($235).

For and in consideration of the above named sum, the said C. C. N. Cutler shall convey by good and sufficient deed all of his right, title, claim and interest in and to a certain tract of land heired by Mary A. H. Cutler, through her father, Bryant Cutler, deceased, it being a certain tract conveyed by the said Mary to Robert Gurganus and by him conveyed to C. C. N. Cutler, containing six acres, as the above deeds will show.

The above being the most equitable terms upon which we could agree; and in reporting the same, we beseech you, gentlemen, to accept this in the name of peace, and try prevent any further unkindly feeling from rising between yourselves or your offsprings.

Respectfully submitted,

(Signed) T. H. HARVEY. [SEAL]
March 3, 1913. (Signed) JOHN B. RESPASS. [SEAL]

The court held the arbitration and award to be void, and rendered judgment declaring the plaintiff to be the owner of the land in controversy, and the defendants excepted and appealed.

Daniel & Warren for plaintiff.
Ward & Grimes for defendants.

ALLEN, J. An agreement to arbitrate is a contract, and from it the arbitrators derive their authority to bind the parties by their decision. The agreement is the foundation of the award (*Sprinkle v. Sprinkle*, 159 N. C., 83), and if the controversy relates to the title to land, it must be in writing. *Fort v. Allen*, 110 N. C., 183.

The agreement to arbitrate, relied on by the defendants, is in writing, but it is so fatally defective that it cannot be enforced as a contract. It contains no description of the land, the title to which was in controversy, and refers to it simply as a certain tract of land, and there is no finding or statement that aids the description.

We must, then, consider the legal effect of the award, as if made upon an oral agreement to arbitrate, and we find that the question was considered and ruled against the position of the defendant in *Crissman v. Crissman*, 27 N. C., 498, which was approved in *Pearsall v. Mayers*, 64 N. C., 552.

In the *Crissman case*, which was an action of ejectment, there was an oral agreement to refer title to arbitrators, and there was a written award, and the Court, after stating several objections to the award, said: "But, admitting that those objections could be answered, there remains one that we deem insuperable. It is, that the submission was not by deed or in writing, and, therefore, that the ward, as far as it affects the title to land, is void under the act of Assembly of 1819."

There is another objection to the ward which renders it invalid, and that is that the arbitrators exceeded the meaning and scope of the submission.

Conceding that the land described in the complaint is the land involved in the agreement to arbitrate, the agreement referred to the arbitrators the *title* to the land, and gave them no power to do more than determine the title between the parties, and it appears from the award that they undertook to compromise the matters in difference by directing one of the parties to pay a sum of money, and the other to execute a conveyance.

It is well settled that the arbitrators cannot exceed the authority conferred upon them by the agreement. (*Robertson v. Marshall*, 155 N. C., 171), and the case of *Duncan v. Duncan*, 23 N. C., 467, furnishes an application of the principle very much like the case before us. The headnote to that case is as follows: "Where an action of ejectment was

referred, by rule of court, to arbitrators, and they awarded as follows: 'We find the plaintiff in the case, Mary Duncan, has, at various times, paid to Roland Duncan, in cash, notes and property valued at $1,544: we therefore award to her three-fourths the whole amount of land purchased of the executors of Charles Finlay, deceased, to be taken off of the upper part of said land': *Held,* that this award was not only uncertain, but that it went beyond the rule of reference, and therefore the court will not enter judgment on it."

We are therefore of opinion that his Honor held correctly that the award was not an estoppel, and the judgment is

Affirmed.

MOLLIE HOBGOOD v. LOGAN HOBGOOD, WALTER PIPPEN ET AL. AND HENRY JOHNSON AND JULIAN BAKER, TRUSTEES.

(Filed 22 September, 1915.)

1. Wills—Interpretation—Estates—Contingent Devises.

A devise to the testator's sister for life, then to his nieces, P. and M., with provision that should either of his said nieces die leaving no child or representative thereof, the one-half interest of such should go to the other; but should both nieces die without child or representative of such, then the property devised to them shall go to certain named nephews: *Held,* the life tenant having died, the nieces took, respectively, an estate in fee in one undivided half of the property, defeasible as to each upon her dying without child or representative thereof, and in case either die without such representative, her share would go to the survivor in fee, the entire estate being then a fee defeasible in case of such survivor's death without child or descendant, and passing, in that event, to the nephews named as ultimate devisees; and should some of these last have died without children, then to the survivors.

2. Same—Children—Designation of Estate.

An estate for life, then to P. and M., but should either die without child or children, then to certain ultimate devisees: *Held,* the children of P. and M. are not given directly any estate or interest in the lands, their existence being only referred to as the determining event in the defeasible estates taken by their parents, and they may take only such as may come to them by descent.

3. Estates—Wills—Contingent Interests—Deeds and Conveyances—Warrants—Consideration.

Where lands are devised to P. and M., but should either die without children, then to the survivor, and M. has died without children, P. taking the whole estate, defeasible in the event of her death without children, whereupon it would go to certain ultimate devisees: *Held,* a conveyance to P. from such ultimate known devisees would be valid, when made upon a good consideration, and will conclude all who must claim under the grantors, even though the conveyance is without warranty or valuable consideration.

4. Judgments—Scope of Action—Estoppel.

Where a former decree has been entered in proceedings which were only designed and intended to convert certain lands devised into cash and to preserve the fund in lieu thereof, and which goes beyond its intended purpose and erroneously construes the terms of the will, and without all the necessary parties, it will not thereafter estop the beneficiaries, denied their rights under a proper interpretation of the devise, from asserting them in a proper and independent suit; and in this case it is further held, that mutuality, necessary to an estoppel, was lacking.

5. Trusts and Trustees—Trust Funds—Lands—Proceeds—Payment—Receipt—Voucher.

Where lands have been sold and the purchase price is held by trustees in lieu thereof, subject to the final decree of the court, and accordingly the right of the person entitled has been adjudicated, his receipt held by the trustee is a sufficient voucher for the disbursement of the trust estate.

APPEAL by Johnston, trustee, from *Carter, J.*, at the June Term, 1915, of EDGECOMBE.

Civil action to recover a trust fund. The facts chiefly relevant to the inquiry are very well set forth in the complaint, as follows, with the addition that the recited consideration of the deed of Logan Hobgood to the plaintiff, his mother, is natural love and affection, and $1.

2. That Martha A. Knight, late of Edgecombe County, North Carolina, died leaving a last will and testament, which is recorded in the office of the clerk of the Superior Court of Edgecombe County, in Will Book H, page 420, the third item of which is as follows:

"I give and devise all my right, title and interest in and to the tract of land situate in said county and State, upon which I now reside, to my sister, Mary L. Drew, during the term of her natural life, and after her death to my nieces, Pattie Pippen and Mollie Hobgood, their heirs and assigns, share and share alike. If, however, the said Pattie Pippen shall die leaving no child, and no representative of a child, it is my will and desire that the one-half interest in the realty devised to her as aforesaid in this item of my will shall go to the said Mollie Hobgood, her heirs and assigns; but if, on the other hand, the said Mollie Hobgood shall die leaving no child, and no representative of a child, it is my will and desire that the one-half interest in the realty devised to her as aforesaid in this item of my will shall go to the said Pattie Pippen, her heirs and assigns. In the event that the said Pattie Pippen and Mollie Hobgood shall both die leaving no child, and no representative of a child, it is my will and desire that the said realty devised to them as aforesaid in this item of my will shall go to my nephews, Joseph Pippen, Walter Pippen, William Pippen, Lafayette Pippen, and Thurston Pippen, their heirs and assigns."

3. That Mary L. Drew is now dead; and the land mentioned in item 3 of said will of Martha A. Knight and so devised to Pattie Pippen and Mollie Hobgood, was, on the .... day of ....., ..., sold

by W. H. Johnston, administrator *d. b. n.* of Peter E. Knight, and the proceeds thereof belonging to the said Martha A. Knight, towit, the sum of $942.67, was paid by said W. H. Johnston, administrator *d. b. n.*, to L. B. Knight and Henry Johnston, executors of the said Martha A. Knight.

4. That at the June Term, 1899, of the Edgecombe County Superior Court, in an action entitled W. H. Johnston, administrator *d. b. n.*, with the will annexed of Peter E. Knight, L. B. Knight and Henry Johnston, executors of the will of Martha A. Knight, and others, against William Pippen and others, a judgment was rendered in which Henry Johnston was appointed trustee for the sum of $445.10, to be held for the use and benefit of the said Pattie Pippen under the terms of item 3 of the will of the said Martha A. Knight, and Dr. Julian M. Baker was appointed trustee for the sum of $445.09, to be held for the use and benefit of the said Mollie Hobgood under the terms of item 3 of the will of the said Martha A. Knight, these being the amounts paid to the said L. B. Knight and Henry Johnston, executors, by the said W. H. Johnston, administrator, as aforesaid. (See page 259, minute docket of June Term, 1899, of the Superior Court of Edgecombe County.)

5. That the said Henry Johnston and Dr. Julian M. Baker accepted said trusts and entered upon their respective duties, and they now have on hand the sums of $445.10 and $445.09, and some interest, respectively, and held under the terms of their said trusts.

6. That the said Pattie Pippen is dead, and left no child or representative of a child; that Joseph Pippen and William Pippen, two of the residuary devisees under item 3 of the will of said Martha A. Knight, are dead, and left no child or representative of a child or children; that Mollie Hobgood is now living and has one child over 21 years of age, who is a defendant in this action; and Walter Pippen, Lafayette Pippen and Thurston Pippen, the remaining residuary devisees under item 3 of the said will, are now living.

7. That on 12 March the said Walter Pippen, Lafayette Pippen and Thurston Pippen, the remaining residuary devisees under the will of the said Martha A. Knight, for proper and legal consideration, executed and delivered to the said Mollie Hobgood a certain paper-writing by the terms of which the said Walter Pippen, Lafayette Pippen and Thurston Pippen did give, grant, assign, alien and convey to the said Mollie Hobgood, her heirs and assigns, all their right, title and interest which they now have or may hereafter have in and to the funds now in the hands of Henry Johnston and Dr. Julian M. Baker, trustees of the funds paid them by L. B. Knight and Henry Johnston, executors of the will of the said Martha A. Knight. That on 29 April, 1915, Logan Hobgood, the only child of Mollie Hobgood, plaintiff in this action, in consideration of love and affection and $1, executed and de-

livered to said Mollie Hobgood a certain paper-writing, by the terms of which he granted, assigned, aliened and conveyed to said Mollie Hobgood all his right, title and interest which he then had, or might thereafter have, in and to said trust funds held by Henry Johnston and Dr. Julian M. Baker, trustees as aforesaid; and on 3 May, 1915, Thurston Pippen and M. V. Pippen, his wife, and Lafayette Pippen and Glynn Pippen, his wife, executed and delivered to said Mollie Hobgood a certain paper-writing, by the terms of which they gave, granted, assigned, aliened and conveyed to said Mollie Hobgood all their right, title and interest which they then had, or might thereafter have, in and to said trust funds held by Henry Johnston and Dr. Julian M. Baker, trustees as aforesaid; that copies of these conveyances are hereto annexed and made a part of this allegation.

8. That the above named parties, towit, Walter Pippen (unmarried), Thurston Pippen and wife, M. V. Pippen, Lafayette Pippen and wife, Glynn Pippen, and Logan Hobgood are the only persons, other than said plaintiff, who could in any way become interested in said trust funds held by Henry Johnston and Dr. Julian M. Baker, trustees as aforesaid.

The answer substantially admits the above allegations, except that it sets forth the exact terms of the decree under which the trust fund is held, as follows:

"A decree was entered as set forth in said paragraph, appointing Henry Johnston trustee of the fund of $445.10 to be held for Pattie Pippen, and Dr. Julian M. Baker was appointed trustee for the sum of $445.09 to be held for Mollie Hobgood, but the terms of trust in said decree read as follows, viz.: Pay to J. M. Baker $445.09, 'to be held by him upon the following uses and trusts, towit: to invest the same and pay the income arising therefrom annually to Mrs. Mollie Hobgood, during her natural life, and at her death, leaving a child or a representative of a child, then to pay said trust fund (the principal thereof) to said child or representative of a child. But in the event of her death, leaving no child and no representative of a child, then the said Julian M. Baker, trustee, is to pay the income arising from said trust fund to Pattie Pippen, during her life, and at her death, leaving a child or representative of a child, then to pay said trust fund to such child or representative of a child. In the event that said Mollie Hobgood and Pattie Pippen shall both die leaving no child or representative of a child, the said Julian M. Baker, trustee, is to pay said trust fund to Joseph Pippen, Walter Pippen, William Pippen, Lafayette Pippen, and T. F. Pippen, share and share alike.

Upon the facts, the court, being of opinion that the fund held by Henry Johnston, originally for Pattie Pippen, now deceased, vested, on such death, absolutely in the petitioner, entered judgment that the same be paid to her, less certain *costs* and *fees*, and being of opinion that the

fund held by Julian Baker, representing the original interest of petitioner, should be further held, adjudged that, as to that portion, the trustee, Julian Baker, should continue to invest the fund and pay the interest to the petitioner during her natural life, as directed by the former decree.

To which judgment the trustee, Henry Johnston, having duly excepted, appealed.

Allsbrook & Phillips for plaintiff.
G. M. T. Fountain for defendant.

HOKE, J. The fund in the hands of these two trustees was evidently designed and intended by the court and parties interested to stand in lieu of the land and to be subject to the terms and conditions of the will of Martha A. Knight, by whom it was devised. Recurring, then, to the clause of the will in question, under numerous decisions of our Court, it conferred upon Pattie Pippen and Mollie Hobgood, respectively, an estate in fee in one undivided half of the property, defeasible as to each upon her dying without child or the representative of a child, and, in case either died without child or descendant of such child, her share was to be owned in fee by the survivor, the entire estate being then a fee defeasible in case of such survivor's death without child or descendant, and passing, in that event, to the ultimate devisees, nephews of the devisor, named and specified in the will, towit: Joseph, Walter, William, Lafayette and Thurston Pippen, and two of these having died without children, the said interest was then held and owned by the other three, Walter, Lafayette and Thurston. *Burden v. Lipsitz,* 166 N. C., p. 523; *Rees v. Williams,* 164 N. C., p. 128; same case, 165 N. C., p. 201; *Smith v. Lumber Co.,* 155 N. C., p. 389; *Harrell v. Hagan,* 147 N. C., p. 111; *Whitfield v. Garris,* 134 N. C., p. 24.

Under these authorities and by the terms of the devise, the children of Pattie Pippen and Mollie Hobgood are not given directly any estate or interest in the land; their existence is only referred to as the determining event in the defeasible estates taken and held by their mother, and, of themselves, they have no interest except what might descend to them from their respective mothers. This being true, and Pattie Pippen having died without child or children or the descendants of such, the present estate in fee in the entire property is held and owned by Mollie Hobgood, defeasible at her death without child, etc., and in which event the property would go to the ultimate devisees, the Pippen nephews, and all of these having conveyed their interest, title, and estate to Mollie Hobgood, there is no reason, under the terms of the devise, why she should not presently take and receive the entire fund; our decisions on the subject being to the effect that when the holders of a contingent estate are specified and known, they may assign and convey it, and, in the absence of

fraud or imposition, when such a deed is made, it will conclude all who must claim under the grantors, even though the conveyance is without warranty or any valuable consideration moving between the parties. This was held for law by a majority of the Court in *Kornegay v. Miller,* 137 N. C., p. 659, in which case, it may be noted, that the contingent interest of Annie Slocumb was held to pass by her quit-claim deed and for a recited consideration of $1. In many of the decisions on the subject it had been held that, in order to a valid conveyance of such an interest, there must have been a valuable consideration passed or there must have been a warranty estopping the heir by way of rebutter. *Wright v. Brown,* 116 N. C., p. 26; *Foster v. Hackett,* 112 N. C., p. 546; *Watson v. Smith,* 110 N. C., p. 6; *Southerland v. Stout,* 68 N. C., p. 446, and the writer was of opinion that such was the law, but a majority of the Court, after full consideration, having come to a different conclusion and the decision being in the line of unfettering estates, the dissent was only noted, the writer desiring, as far as he could, in that way to give notice that the case would be no longer questioned and might be considered by the profession as a rule of property. The case of *Burden v. Lipsitz,* cited and to some extent relied upon by appellant, is not in contravention of this position. In *Kornegay's case,* as in this, the ultimate devisees were ascertained and designated by name, and they having the contingent estate, it was held that they could convey it, and their descendants or heirs, having to claim through them, were concluded by the deed of the ancestor. *Kornegay v. Miller, supra; Bodenhamer v. Welsh,* 89 N. C., p. 78. But in *Burden's case* the ultimate takers, designated in the devise as "the heirs of the devisor," were not known nor could they be ascertained till the preceding estate had terminated. *Harrell v. Hagan, supra; Buchanan v. Buchanan,* 99 N. C., p. 308; and the claimants being required to fill the description when such estate fell in, and, in that event, taking the estate direct from the devisor (*Sessoms v. Sessoms,* 144 N. C., p. 121), there was, therefore, no ascertained, recognized owner of the contingent estate in a position to make a conveyance, and the deed tendered by the sons and daughters of the devisor did not assure the title. These might not have been "the heirs of the devisor" when the preceding estate terminated.

It was urged for the appellant that the former decree established an interest in the fund in favor of the children of Pattie Pippen and Mollie Hobgood, and the present decree having also recognized such an interest, the same not having been appealed from, may not now be disturbed; but we are of opinion that, on the record, such a position cannot be sustained. The former decree, as stated, was designed and intended to preserve the fund in lieu of the property and to subject it to the terms and limitations of the devise, and, while the court below, misconstruing the devise, may have undertaken to recognize an independent interest in

the children, there was nothing in that proceeding that conferred any such power on the court.

As we have endeavored to show, the children of these first takers had no direct interest in the property; they could only take as heirs of their respective mothers, and if any portion of the decree went further, it was entirely beyond the scope of the issue and must be held of none effect. Nor could the judgment operate by way of estoppel, for the children, not being in any way represented before the court, they were in no way bound by the decree, and no more should their mothers be concluded, for it is a fundamental principle in the law of estoppel that they must be mutual. This principle, that a judgment or decree which undertakes to determine rights entirely beyond the scope of the issue may be disregarded even in a collateral proceeding, is very well brought out in the case of *Munday v. Vail,* 34 N. J. L., p. 418. In that case Asa Munday, in 1841, made a deed of trust in favor of himself for life and then to his wife and children. Subsequently, in 1844, one Ephraim Munday filed a bill to subject the property to a debt against Asa, claiming that the deed was fraudulent and void as to his claim. The bill was sustained and decree entered declaring that the deed of trust was fraudulent, null and void, of "no force in law or equity," and that same be delivered up and canceled, and provided further, that the judgment formerly entered, in favor of Ephraim Munday, is and was a valid lien on the property. The judgment debt having been otherwise paid, the property was sold for costs in a suit and conveyed to defendant, and who was also shown to be a devisee of the property under the will of Asa Munday. Case, one of ejectment, in which plaintiffs claimed under a deed from the sole surviving child and issue of Asa and Hettie Munday and to whom the trustee had also conveyed. Defendant claimed under the deed of sheriff and the will of Asa Munday, and, as stated, on the facts, a recovery by the plaintiff was sustained, the Court being of opinion that the portion of the decree which adjudged that the instrument was entirely void and should be delivered up and canceled, was beyond the scope of the issue and could be treated as void in a collateral proceeding. Speaking to this particular question, *Beaseley, C. J.,* delivering the opinion, said: "Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, re-

ceived much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, that a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises." And again: "The invalidity of such a decree does not proceed from any mere arbitrary rule, but it rests entirely on the ground of common justice. A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels. But records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants. Thus, *Lord Coke*, treating of this doctrine, says: "A matter alleged that is neither traversable nor material shall not estop." Co. Litt., 352b.

A similar ruling was made by the same eminent Court, in *Dodd v. Una*, 40 N. J. Eq., 672, where the position was applied and sustained in learned opinions by *Magie, J.*, *Depue, J.*, concurring, and the general principle has been recognized in this jurisdiction in *Springer v. Sharender*, 118 N. C., p. 40, and *Allred v. Smith*, 135 N. C., p. 443, the New Jersey decision, referred to, being cited with approval in the first of these cases.

The decree in the present case being predicated upon the former decision, should, in this feature, partake of the same infirmity, except that in the present suit Logan Hobgood, the only child of petitioner, Mollie, has, with the ultimate devisees and owners of the contingent interest, been made party defendant. It appears in the statement of facts, however, that he, too, has conveyed to his mother, the petitioner, "for love and affection and for $1," all his right, title and interest in the fund.

It appearing, therefore, that the fund is held in lieu of the property devised, and all the parties of record who have or can have any interest have conveyed their right and claim to petitioner, there is no reason that appears to us why the fund held by both trustees should not presently be paid her and her receipt constitute a valid voucher in the disposition of the trust estate. In order that the decree may the better operate for the protection of these trustees, it may be well to amend the decree below so as to direct payment of both funds to the petitioner. This will be

certified, that the former judgment shall be modified and a decree entered in accordance with the rights of the parties as declared in this opinion.

Modified.

F. M. COOKE v. FOREMAN DERRICKSON VENEER COMPANY.

(Filed 22 September, 1915.)

1. Bailment—Implied Liability—Negligence—Fraud—Contracts—Insurer.

At common law a contract of bailment places by implication an undertaking upon the bailee to execute the bailment purposes with due care, skill and fidelity, or reasonable care in protecting and caring for the subject of bailment, which may be changed by special contract, making the bailee's responsibility that of an insurer, irrespective of negligence or fraud in the breach of the bailment contract.

2. Same—Rent of Barge.

Where a barge is rented under a contract that it will be returned to the owner in as good condition as when received, ordinary wear and tear excepted, and it appears that the barge was in condition to fulfill the requirements contemplated and that while in the bailee's possession and service it turned over in the water, delaying its return: *Held*, the bailee is liable for the rent thereof until its return to the owner, irrespective of the question of its negligence, the only available defense being the "act of God or the king's enemies."

APPEAL by defendants from *Shaw, J.*, at the June Special Term, 1915, of PASQUOTANK.

Civil action tried upon these issues:

1. Did the defendant hire the barge from the plaintiff, as alleged? Answer: "Yes."

2. Was the said barge, at the time of delivery to the defendant, in a proper condition to be used as contemplated by the parties? Answer: "Yes."

3. What amount is due for rent of barge? Answer: "$175, with interest from 13 April, 1914."

4. Was said barge injured by the negligence of the defendant while in its custody, as alleged? Answer: "No."

5. If so, what damage has the plaintiff sustained by reason of the same? Answer: "None."

The court rendered judgment for the plaintiffs, and defendants appealed.

Thomas J. Markham, Aydlett & Simpson for plaintiff.
Ehringhaus & Small for defendant.

BROWN, J. In *Roberts v. Lumber Co.*, 165 N. C., 4, it is held by a unanimous Court: "Where A enters into a contract with B for the

renting of a boat, wherein it is agreed that A will keep it in good repair and return it in good condition, and the boat is returned in a damaged condition, A is liable to B for damages arising from the breach of contract, irrespective of the question of negligence."

That case fully sustains the judgment rendered upon the issues. At common law bailment contracts are largely implied from the character of the transactions. From the delivery of a chattel in bailment the law implies an undertaking upon the part of the bailee to execute the bailment purpose with due care, skill and fidelity.

The bailee is liable for reasonable care in protecting and caring for the subject of the bailment. *Coggs v. Bernard*, 1 Smith Ldg Cases, 7th Ed., 369.

The parties may, however, substitute a special contract for this contract implied by law. In such cases the express agreement determines the rights and liabilities arising from the bailment. The bailee may be relieved of all liability, or he may become an insurer. A bailee may thus become liable, irrespective of negligence or fraud for a breach of the bailment contract. Hale on Bailments, 28, and cases cited in notes; *Grady v. Schweinler*, 15 A. and E. Anno. 161.

This doctrine is first recognized in this State in *Martin v. Cuthbertson*, 64 N. C., 328; *Lane v. Cameron*, 38 Wis., 603; *Cullen v. Lord*, 39 Iowa, 302.

In line with this doctrine it is held in Massachusetts that a special promise or contract must be alleged where the ground of action is not the negligence of the bailee liable only for ordinary care. *Kingsley v. Bill*, 9 Mass., 198.

The doctrine in its most advanced form is thus referred to by the *Chief Justice* in *Clark v. Whitehurst*, at this term, in referring to the case of *Sawyer v. Wilkinson*, 166 N. C., 497:

"Though this decision is in accordance with the weight of authority, there are many cases which hold that even where the party holds under a contract of bailment, if there is a special contract to return the horse in good condition, and the horse dies in the bailee's possession, though without fault on his part, he is liable for its value as insurer."

It is stated in the record that the "defendant agreed to redeliver the barge in as good condition as when received, ordinary wear and tear excepted." Under such contract the defendant is liable for the return of the barge in as good condition as when received, unless prevented by the "act of God or the King's enemy," and is liable for the stipulated rent until returned.

If the barge had gone down in a storm or had been entirely destroyed without the fault or negligence of defendant, so the contract could not be performed, a different case would be presented from the one before us.

The plaintiff seeks to recover the rent for this barge while in the

possession of defendant. It was delivered to defendant in proper condition to be used as contemplated by the parties on 23 February, 1914, and returned on 13 April. The barge was loaded by defendant with "shook," and while so loaded and under the control and management of defendant, it capsized, turning away from the wharf at defendant's plant, on 24 February, 1914.

The barge remained in defendant's possession loaded with defendant's "shooks" until defendant raised it and unloaded it and returned it to plaintiff on 13 April. Under such conditions under the contract of bailment, the defendant is clearly liable for the stipulated rent irrespective of any negligence upon its part.

This case differs from *Sawyer v. Wilkerson, supra,* very materially. In that case the mule died without any fault or negligence upon the part of the bailee, and the animal could not be returned. *Actus Dei nemini facit injuriam.*

It also differs from *Seevers v. Gabel* and *McEvers v. Steamboat* cited in the opinion in that case. In those cases the property, the subject of the bailment, was entirely destroyed by fire in one case, and an ice floe in the other, without the fault of bailee and which no foresight on his part could have prevented.

In this case the barge was under the control of defendant, loaded and managed by him when it sank, turning away from its wharf. It contained defendant's cargo, and it was, therefore, necessary as well as the duty of defendant to raise it and retain it in its possession until the cargo was removed.

In the meantime, as the barge was under the control and management of defendant until returned to the owner, his Honor correctly held it liable for the rent.

No error.

MRS. BECCIA MEDLIN v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 22 September, 1915.)

1. Telegraph—Transmission—Terminal Office—Usual Method—Negligence.

When a telegram received for transmission and delivery is sent by the company to one of its offices, not the usual one for delivery at a certain place near by, and the delivery attempted there by phone, the measure of the company's duty to make a prompt and safe delivery is increased, and where there is evidence that by reasonable effort to deliver at its proper office the delivery would have been made in time to have avoided the injury complained of in the action, the question of defendant's negligence should be submitted to the jury.

2. Same—Evidence—Trials—Questions for Jury.

In an action to recover damages for mental anguish from a telegraph company for its alleged negligent failure to deliver a telegram accepted

by it for transmission and delivery, and addressed in care of Rosemary Mills, there was evidence tending to show that it had a regular office where it customarily delivered messages at the address given, both by 'phone and messenger service; that addressee was well known and within the free delivery limits of this office, but that the defendant transmitted the message, contrary to its usage, to another town some short distance away; that its agent there attempted to deliver the message by 'phone, but made slight inquiry there to find the addressee, and then telephoned the message to another mill in the vicinity, to one of the same surname but of different given name; being subsequently informed that the addressee was not located at this mill, that she was at another mill in the vicinity, to which the message had been originally addressed, and could be communicated with, replied thereto that the message had been already delivered; and it further appearing that the sender's address had been left at the receiving point, who thereafter, upon inquiry, was informed by the company's agent that the message had probably been delivered, for, if not, a service message would have been received: *Held*, sufficient evidence to be submitted to the jury upon the question of defendant's actionable negligence in failing to deliver the message, especially as afterwards the company was informed, at the place of destination, that sendee was there and would be brought to the telephone to receive the message, and this offer was ignored.

3. Telegraphs—Efforts to Deliver—Evidence—Negligence.

Where a telegraph company has accepted for transmission and delivery, over its own and a telephone line, a telegram addressed care of Rosemary Mills, it is its duty to make reasonable effort to deliver the message by phone or messenger at the place specified when within its free delivery limits, if such service was required for its delivery; and under the circumstances of this case, it is held that its failure to have done so is evidence sufficient to take the case to the jury upon the question of its actionable negligence.

4. Contributory Negligence—Pleadings—Trials—Burden of Proof.

Contributory negligence, when relied upon as a defense, must be alleged in the answer, and the burden of proof will be on the defendant to establish it.

5. Telegraphs—Contributory Negligence—Inaccurate Address.

Where it appears that a telegraph company, by the exercise of the care required of it, could have delivered the message, the subject of the suit, though inadequately addressed, contributory negligence in not giving a more definite or accurate address cannot successfully be interposed as a defense, especially where no inquiry was made of the sender for a better address.

6. Telegraphs—Messages Collect—Acceptance of Message—Evidence—Nondelivery—Prima Facie Case.

Where a telegraph company accepts a message for transmission and delivery where the tolls have been paid, or without demanding their payment on delivery thereof, and there is evidence that the message had not been delivered, a *prima facie* case of negligence is made out in plaintiff's favor, calling upon the defendant to show matters in excuse.

7. Telegraphs—Negligence—Instructions—Proximate Cause.

In an action to recover damages for mental anguish for the alleged negligent delay of a telegraph company in delivering a message, thereby preventing the plaintiff from attending the funeral of her mother, an instruction by the court that the plaintiff must show the negligent failure

of the defendant in not delivering the message; that this must have prevented plaintiff from attending the funeral, and thereby have caused the mental anguish, is sufficient upon the question of proximate cause.

8. Instructions—Special Requests—Appeal and Error.

A refusal by the trial judge to give correct requests for special instruction is not error, if they are substantially given in the charge.

APPEAL by defendant from *Ferguson, J.*, at the Spring Term, 1915, of HALIFAX.

Plaintiff sued for damages on account of the alleged negligent failure to deliver a telegram in the following words and figures:

CHARLOTTE, 4 May, 1914.

To Beccia Medlin, Care Mill, Rosemary, N. C.

Come home at once. Your mother is dead, Elizabeth Edwards.
Rush. (Signed) S. C. McCALL.

Elizabeth Edwards, mother of plaintiff, had died in Charlotte at 8 o'clock in the morning of 4 May, 1914, which was Monday, and the message was sent by S. C. McCall, at the instance and request of Mrs. Mary C. Jonas, sister of plaintiff. The toll for the transmission of the telegram by wire and telephone to Rosemary was prepaid for Mrs. Jonas by McCall, who was a cousin of plaintiff and Mrs. Jonas. The operator at Charlotte told him that it would cost 25 cents for message and 20 cents for telephoning it to Rosemary Mills. He gave her, the operator, the address at Charlotte, so that the answer could either be telephoned to him or Mrs. Jonas or delivered by hand. He and Mrs. Jonas lived within the defendant's free delivery limits. McCall remained at the Edwards residence all that day. No answer came, and no service message up to 11:45 p. m., about fifteen hours after message was sent, and he then called up defendant's office and inquired about message. The operator said, "Wait a minute," and he waited, and was then told that "If the message had not been delivered it would have been sent back." The copy of the message offered in evidence had these entries: "Phone 646-L, 1013 Caldwell Street." The funeral was held at 1 o'clock p. m., 5 May, 1914, and if prompt delivery of the message had been made, the plaintiff could easily have reached Charlotte at midnight of 4 May, and at the latest before the funeral. If Mrs. Jonas had heard from her sister in reply to her message, the funeral would have been postponed until her arrival. She heard of her mother's death the first time on Thursday, the 7th, at 3 p. m., by letter, and on Saturday saw a copy of the message by going to Weldon for it. She left on Saturday night train, and reached Charlotte Sunday.

Plaintiff testified: "There has been a telegraph office at Roanoke Junction ever since I have been in Rosemary. I have sent and received

messages from this (Roanoke Junction) office. It is about one-half mile from this telegraph office at Roanoke Junction to where I live. It is about one-half mile to where I was at work on 4 May, 1914. Prior to 4 May, 1914, when I received messages from the Western Union Telegraph Company's office at Roanoke Junction they were delivered to me by hand, by a young man from the office at Roanoke Junction. Prior to 4 May, 1914, I regularly received mail addressed to 'Beccia Medlin.' "

She introduced the envelopes of several letters addressed to and received by her in the name of Mrs. Medlin, Mrs. Beckie Medlin, and Mrs. Rebecca Medlin, Rosemary Mills, Roanoke Rapids, N. C., or simply Roanoke Rapids, or Rosemary Manufacturing Company, Roanoke Rapids, N. C.; the Rosemary Mills being well known in that section, Weldon and its environs. She was known among the people where she lived and with whom she associated as Mrs. Anna Rebecca Medlin, by which name she was christened, and as "Becky" Medlin, Mrs. Anne Medlin, and Mrs. Rebecca Medlin. Her husband's name is Charles W. Medlin, and they have lived in Rosemary fourteen years, and are well known there.

S. M. Thompson, who lives at Rosemary Mills, testified that he had known plaintiff as Mrs. Becky Medlin for four years. She lives near his home. He further stated that defendant delivered messages often at Rosemary Mills by its messenger boy from Roanoke Junction, and that he frequently directed him to the parties addressed; the defendant's office being a quarter or a half of a mile from his store in Rosemary, and the mill a little nearer to the office.

The operator at Charlotte testified that S. C. McCall told her at the time he filed the message that Mrs. Medlin "worked in the mills," and to address it care of "the mills." She asked him to make it fuller, but he said "care of mills" was all he could do, and this was all the information the witness could get.

The operator at Weldon, N. C., testified that he received the message on time 4 May, 1914, and called up Roanoke Rapids telephone office and asked for Rosemary Mills. Some one answered and he asked if he knew Becky Medlin, and he said, "No," she was not at the mills. He could not say whether he 'phoned the message to Rosemary Mills or not. He then called Patterson Mills, and they answered that they knew a Medlin, by name T. W. Medlin, and he gave them a copy of the message. He called Patterson Mills again in half an hour, and the lady said no copy of the message was there, and she thought it had been delivered. He also mailed a copy of the message to Mrs. Becky Medlin at Rosemary Mills in time to reach that place by the 12:07 o'clock p. m. train the same day, but he did not call up Rosemary and read the message to them; that was all he did about it. Mrs. Medlin afterwards testified that she never received the message by mail, although her husband went to the post-

office in the evening after the time when the defendant's operator said the message should have been there.

A. C. Medlin, witness for defendant, testified that he received the message from the young lady at Patterson Mills, and inquired in the mill for the addressee, and, not being able to find any one by that name, he returned the message and told them they would probably find Mrs. Medlin at Rosemary Mills, and there were some of the Medlins who lived there, but he did not know their names. He got the telephone message between 9 and 10 o'clock on Monday, 4 May, 1914. In an hour or so "he talked to the Western Union himself, and told them there were no Medlins at Patterson Mills, but there were some Medlins at Rosemary Mills," who were not related to him. On Wednesday or Thursday, the 6th or 7th day of May, he was called over the long-distance telephone by some one who wanted C. W. Medlin. He sent for him to Rosemary Mills. He came, and witness told him about the message of Monday. He said that he had not received it. Patterson town is not Rosemary, but a half or a mile away. The witness, who was called by the defendant, further testified:

"I did not tell the Western Union that the telegram had been delivered. I did not tell the Western Union that I would try to find them. I told the Western Union that probably she would find them at Rosemary."

The postmaster at Rosemary testified: That he did not recall whether or not he had received letters for Becky Medlin, but had been there only one month before 4 May, 1914. "I cannot say that these envelopes were delivered to Mrs. Medlin. I do not remember every letter delivered to her. He (C. W. Medlin) has a box at Rosemary. The defendant has an office at Roanoke Junction and received telegrams there for Rosemary and delivered them over the 'phone. I received and delivered a letter for Mrs. C. W. Medlin."

T. W. Medlin, defendant's witness, testified that he was superintendent of Rosemary Mills, and was 'phoned about the telegram, and answered that he did not know Becky Medlin, but gave them the names of I. D. and C. W. Medlin. Mrs. Medlin's name was on the pay roll as "Mrs. Medlon," or "Mrs. C. W. Medlin," not as Becky Medlin, but she was the only Mrs. Medlin on the roll. They did not tell him the nature of the message.

H. L. Grant, defendant's witness, testified that he is defendant's claim agent, and as such, about one week after 4 May, 1914, he inquired at the postoffice, of Superintendent Mullin, and a neighbor across the street, if they knew Becky Medlin, and they answered "No," but that he found her husband, C. W. Medlin.

Witnesses of defendant, in rebuttal, testified that the defendant delivered messages by hand and by 'phone from Roanoke Junction to Rosemary Mills, and that they knew C. W. Medlin, husband of plaintiff,

and that Mrs. Medlin, his wife, was the only woman of that name in the mills on 4 May, 1914. There was also evidence that no copy of the message, if ever mailed, was received by Mrs. Becky Medlin.

S. C. McCall also testified that the agent at Charlotte did not ask him for a better address.

C. O. Boyd, witness for plaintiff, testified: "I worked in a store at electrical work; am an electrician. On 4 May, 1914, I was in R. E. Shell's general mercantile store at Rosemary, N. C. The Western Union called up (the store) from Weldon, and I answered the 'phone. She said that they had a telegram for Becky Medlin and asked me if I knew her. I said, 'Yes,' and I asked her (the operator) if she wanted me to get Becky Medlin to the 'phone, and I offered to get her to the 'phone for them. She (operator) said, 'Wait a minute.' In five or ten minutes she called up and said she had delivered it to the Patterson Mills. I told her that she had delivered it to the wrong place. I have been knowing her (indicating the plaintiff) as Becky Medlin for ten or twelve years. It was a lady who called me over the telephone; said she was in the Western Union Telegraph office in Weldon. It was some time before dinner."

There was evidence tending to show severe mental anguish caused by the defendant's negligence in not delivering the telegram, and damages resulting therefrom.

The defendant tendered an issue as to contributory negligence, which the court refused to submit to the jury, and the defendant excepted. The defendant requested the court to give the following instructions to the jury:

1. Before the plaintiff is entitled to recover, she must satisfy you by the greater weight of the evidence that the facts are true as she contends they are; failing in this, she would not be entitled to recover.

2. It is not mental anguish alone which entitled the plaintiff to recover damages, however she may have suffered, but it must be coupled with the negligence of the telegraph company, and, too, that negligence must be the proximate or actual cause of the injury, as in other cases.

3. The plaintiff, before she can recover, must show to you and prove by the greater weight of the evidence that there was no negligence on her part, either directly or indirectly or in continuous sequence, contributing to or helping to bring about her alleged injury as in other cases.

4. Telegraph companies are only bound to the exercise of that measure of care and diligence which a man of ordinary prudence would use under like circumstances. They must be prompt and diligent, it is true, but to demand more of them would be to apply a rule which would result sometimes, if not in the larger majority of cases, in oppression and

gross injustice. The law will require of them their full duty, and no more.

5. You will take into full consideration the contract between the parties put in evidence by the plaintiff. You will consider the figures "25-20" on the message, which is the contract, as corroborative, or helping to prove, the defendant's contention that McCall, who sent the message, was told that it would have to be sent part of the way over a 'phone line.

6. The court instructs you that there is no evidence of delay in transmitting the message by the telegraph company.

7. If you find from the evidence the fact to be that the delay and failure to deliver happened after the message was passed to the 'phone line, then the telegraph company would not be liable, and you will answer the issue as to contributory negligence of defendant, "No."

8. If you find that the way in which the message was addressed caused, or helped to cause, the failure in the prompt delivery of the message, then you are instructed to answer the issue as to negligence, "No." In considering this view you will take into consideration that the plaintiff was called for over the 'phone from Charlotte, and not found; that no letters were received at the postoffice addressed as the message was; that a letter addressed, shortly after the message was sent, to Mrs. C. W. Medlin, was promptly received, she being the plaintiff.

9. If you find that the message was delivered at the Rosemary Mill, then the defendant company would not be liable, the message being addressed "Care of the Mill," and you will answer the issue as to negligence, "No."

10. If you come to consider damages, the law requires that you do not allow anything at all for natural grief and sorrow, for this must come to all; you can only allow for the grief or anguish which is caused directly by the negligent act of the defendant.

11. The law permits the sender of a telegram or the one to whom it is sent, where there is no reasonable effort made to deliver the telegram, and the telegraph company is guilty of negligence in not delivering the message, to recover damages, as a punishment to the company for neglecting its duty to the public.

12. If you you find the facts to be that the defendant made the efforts to deliver the message as contended for by it, then the court instructs you that in law it made a reasonably diligent effort to deliver the message, and you are instructed to answer the issue as to the negligence, "No."

13. The message being addressed to "Mrs. Beccia Medlin," the court instructs you that the word "Beccia" does not spell "Beckie," and the message was not addressed to Mrs. Beckie or Rebecca Medlin, and you will answer the issue as to negligence, "No."

These prayers will be referred to hereafter in the opinion.

The court stated the issues and contentions of the parties, and gave the following, among other, instructions to the jury:

1. The plaintiff alleges that if the message, which it is admitted was received by the defendant company, had been promptly transmitted and delivered to her, she could and would have attended the funeral of her mother in Charlotte, and that, by reason of the failure of the defendant to transmit and deliver the message she did not know of her mother's death until after she was buried, and that this caused her mental anguish.

2. The defendant contends that it did all that it reasonably could do. It received the message from the sender, McCall, and told him that it would have to be sent by 'phone, and that they undertook to deliver the message, but could not find the sendee of the message. Evidence has been offered for your consideration and you are the sole judges of the credibility of the testimony and the weight to be given it.

3. The burden of proof is on the plaintiff by the greater weight of the evidence to show the negligence of the defendant, and also the mental anguish which she suffered in consequence of that negligence. It was the duty of the defendant when it received the message to forward it promptly, it being what is called a "death message," that is, announcing the death of a near relative, and to take or make such reasonable efforts to deliver the message promptly as was reasonably necessary in order to do it, within the means which were at the command of the defendant or reasonably could be at its command. The defendant contends that the information which it received from S. C. McCall was that he did not know her address more than that it was Rosemary, N. C., and that she worked in the mill, and, in order to expedite the delivery of the message, it was written on the face of it "Care of the Mills."

4. The defendant contends that when the message was received at Weldon she called up the mill at Rosemary, and was informed that there was no such person there; that then she tried to find her at the Patterson Mills, and they thought they had accomplished all that they could do.

5. If you should find from the evidence that the defendant delivered the message or attempted to deliver the message at the mill, and that was all the information the defendants could acquire, after reasonable inquiry, then the plaintiff would not be entitled to recover.

6. If you should find that the defendant, in making an effort to discover the plaintiff, called up some person over the 'phone at Rosemary, and was informed by that person that he knew Rebecca Medlin, and that he proposed to call her to the 'phone, and the defendant, if its agent had that information, and carelessly failed to deliver the message or to have the plaintiff called to the 'phone, so as to deliver the message, that would be negligence, and the plaintiff would be entitled to recover, if you

should further find from the evidence, by its greater weight, that the failure prevented her from attending her mother's funeral.

7. If you reach the second issue you must eliminate from your consideration the grief and sorrow which the plaintiff suffered on account of the death of her mother. She had no information contained in the message which would have enabled her to reach the bedside of her mother and look on her again while she was living, and therefore she could not recover anything from the fact that her mother died without her being able to be with her or to see her.

8. You cannot give anything to punish the defendant company. This action is not to punish the defendant company because it did not deliver the message. It is a suit brought to compensate the plaintiff for mental anguish which she suffered, if any, by reason of the negligence, if any, of the defendant, and she can have compensation only for whatever mental anguish you may find she suffered which grew out of the fact alone that she failed to get the message in time to see her mother after her death and before her funeral.

9. A case of this kind is one in which the jury have no right—and this is so in all cases—to be influenced by their prejudices for or against either the plaintiff or the defendant. Those are matters which may exist outside the courthouse, but when you come into the court it is your duty to find the facts from the evidence.

10. If you find in favor of the plaintiff on the first issue, then you exercise your judgment according to the evidence and proof and find what amount of damages she is entitled to recover because of mental anguish, and that will be your answer to the second issue. If you answer the first issue "No," then you need not answer the second issue.

Upon the issues submitted to the court, the jury returned the following verdict:

1. Was the defendant guilty of negligent delay in the transmission or delivery of the message sued on, as alleged in the complaint? Answer: "Yes."

2. What damages, if any, is the plaintiff entitled to recover? Answer: "One thousand dollars."

Judgment was entered thereon, and defendant appealed.

John L. Bridgers, of Tarboro, and A. S. Barnard, of Asheville, for appellant.

Knight, Peebles & Harris, and Gay & Midyette, of Jackson, for appellee.

WALKER, J., after stating the facts as above: The evidence in this record shows a flagrant case of negligence, not only in one respect, but in several. The defendant, for a consideration, undertook to transmit and deliver this message to the sendee at Rosemary Mills, and it did neither

with that degree of care, nor with a proper regard for her rights, which the law and its express agreement exacted of it. There was negligence in the transmission of the message, as it was sent to Weldon, N. C., when both its duty and its custom required that it should have been sent to its office at Roanoke Junction, which is but a quarter or half of a mile from Rosemary Mills, and where it had both communication with the latter place by telephone and delivery messenger. That was manifestly the proper office at that end of the line to which the message should have been sent. But having selected the wrong office rather increased the measure of its duty to make a prompt and safe delivery. But just here it again failed in the exercise of ordinary care; for after making slight inquiry over the 'phone line at Rosemary, which was altogether too inadequate, defendant's operator at Weldon called up Patterson Mills, for no good reason, so far as appears, and was told that they knew "a Medlin" and "gave them a copy; think they said it was T. W. Medlin." This copy was delivered to A. C. Medlin, who, "not being the sendee or akin to her," returned it to the lady operator at Patterson Mills, after making further inquiry and search for Beckie Medlin, and told her that there was no one of that name there, and that she would probably find here at Rosemary Mills; there being some Medlins who lived there. This seemed to satisfy the operator at Weldon, simply because he had been told by some one that he or she thought it had been delivered at Patterson Mills, and notwithstanding the message from A. C. Medlin that it had not been and could not be delivered there. The effort to deliver the message was then relaxed. It was not sent to Roanoke Junction to be delivered by a messenger, if the telephone calls proved to be unavailing, and who, no doubt, by diligent search could have found Mrs. Medlin at Rosemary Mills, as there was only one woman by that name on the pay rolls, nor was any further and proper effort made to find her at the place to which the message was addressed, although, as she testified, she had received telegrams there from the Junction. They merely asked T. W. Medlin, superintendent of the mills, over the 'phone, if he knew her, and he replied that he did not, but afterwards testified that there was but one Mrs. Medlin in the mills. She had lived at Rosemary with her husband for fourteen years, and he was well known; there being only three Medlins there—C. W. Medlin and his wife, Anna Rebecca (the plaintiff), and J. D. Medlin. But if the defendant was in doubt or unable to deliver the message, its plain duty, as often decided by the Court, was to wire back to Charlotte for a better address, and it would have been forthcoming, as the sender had left both his 'phone and street address, for the very purpose, with the operator there. S. C. McCall, who had delivered the message at Charlotte to the defendant for transmission, knew the sendee well, and, of course, her sister, Mrs. Jonas, could have given a

fuller and more accurate address if one was required. It was clear negligence not to have sought this information by a service message to Charlotte. *Hendricks v. Telegraph Co.*, 126 N. C., 311; 35 S. E., 543; 78 Am. St. Rep., 658; *Hoaglin v. Telegraph Co.*, 161 N. C., 395; 77 S. E., 417; *Ellison v. Telegraph Co.*, 163 N. C., 5; 79 S. E., 277, and cases cited at page 13. But to the several acts of negligence already mentioned—namely, the failure to make adequate inquiry and search at Rosemary Mills, the incorrect delivery at Patterson Mills, to which the message was not addressed, the failure, in the beginning, to send it to Roanoke Junction, the proper station, under all circumstances, and the failure to wire back to Charlotte for a better address—there was superadded the crowning act of negligence in failing to accept the offer of C. O. Byrd to bring the sendee to the 'phone at Rosemary Mills, after he had told the operator at Weldon, in answer to his service message of inquiry, that he knew Beckie Medlin and would perform the service. In reply to this offer the operator said, "Wait a minute," and five or ten minutes thereafter, he was called over the 'phone and told that the message had been delivered at Patterson Mills. This was not only gross negligence, but it is passing strange that such an answer was given after T. W. Medlin had informed the Weldon operator that Beckie Medlin did not live at Patterson Mills and could not be found there. As Beckie Medlin did not arrive at Charlotte on the first train, inquiry was made at the office of the defendant at that place as to whether the telegram was delivered, and the inquirer was told that "if it had not been delivered, it would have been sent back." Well, it was not delivered, and why was it not sent back, if this is the rule of the company, so that the plaintiff could have been notified promptly of its nondelivery and taken steps to insure a better service?

The defendant should have made diligent inquiry and search for the sendee at the Rosemary Mills and elsewhere in Rosemary village, if she was not found at the mills. *Hendricks v. Telegraph Co.*, 126 N. C., 312; 35 S. E., 543; Am. St. Rep., 658; *Kivett v. Telegraph Co.*, 156 N. C., 296; 72 S. E., 388; *Cogdell v. Telegraph Co.*, 135 N. C., 431; 47 S. E., 490; *Hinson v. Telegraph Co.*, 132 N. C., 467; 43 S. E., 945. But it is sufficient to sustain the verdict that the defendant failed to avail itself of the offer of C. O. Byrd, for under the charge of the court the jury have evidently found that the offer was made and not accepted. In whatever light the case is viewed, there was negligence on the part of the defendant.

Defendant asked that an issue as to contributory negligence be submitted to the jury, which was not done. We discover no contributory negligence of the plaintiff in the case. The address was sufficient, if defendant had exercised even ordinary care. C. O. Byrd informed the defendant that Beckie Medlin, the addressee, was at Rosemary Mills, and

could be brought to the 'phone to receive the message, but defendant would not accept this proffer of his services. It cannot, therefore, be heard to say that the address was imperfect, when, had it not been for its negligence, if not perverseness, the telegram would have been delivered to the right person and by that name, nor can it plead contributory negligence successfully, when it appears that due diligence, if it had been used by it, would have resulted in a true delivery with the address it had. It is proper to submit such an issue where there is any evidence to support it, and it is pleaded in the answer. It is not required of the plaintiff to show that she is free from contributing fault, as contended by the defendant. That is a matter of defense, and the burden of proof is upon defendant. *Mullinax v. Telegraph Co.*, 156 N. C., 541; 72 S. E., 583. Where plaintiff proves the delivery for transmission of a prepaid message, or one accepted for transmission without demanding the toll in advance, and a nondelivery of the same, it makes out a *prima facie* case, casting the burden on the defendant of showing any matters in excuse for its failure to deliver the message. *Hoaglin v. Telegraph Co., supra,* and cases cited therein.

The defendant's counsel contended that the question of proximate cause was not properly submitted to the jury, not being necessarily involved in the two issues which the jury passed upon; but a slight reference to the charge will demonstrate that the court fully instructed the jury as to this phase of the case. It is unquestionably true that negligence alone is not actionable, unless it has proximately caused the injury, and so in this kind of case the plaintiff must prove, in order to recover, that the message was not delivered by reason of defendant's negligence or breach of duty, and that its nondelivery or delayed delivery, as the case may be, was the proximate cause of the mental anguish alleged to have been suffered. *Hocutt v. Telegraph Co.*, 147 N. C., 186; 60 S. E., 980; *Hauser v. Telegraph Co.*, 150 N. C., 558; 64 S. E., 503; *Hoaglin's case, supra.* The court instructed the jury that the negligent failure to deliver the message must have prevented plaintiff from attending the funeral of her mother, and thereby have caused her to suffer mental anguish, and that this must be shown by plaintiff before she could recover. The language was plain enough for an intelligent jury to understand what was meant.

As to the instructions requested by the defendant, those which were correct the court gave, at least substantially, in its charge, and those not given were properly refused. Whether the defendant made a reasonable effort to deliver the message was a question for the jury, and the court instructed them fully and correctly in regard to what would constitute due diligence. But the uncontroverted facts showed a clear case of negligence. Some of the prayers were not in accordance with the evidence. It is unnecessary to consider them in detail. The charge

was a fair exposition of the law applicable to the evidence, and, if anything, was liberal towards the defendant.

The case was ably and ingeniously presented to us by the defendant's counsel, and remarkably so, considering what a small margin there was upon which to base a successful defense.

There was no error committed at the trial.

No error.

A. W. GARD AND WIFE, ELIZABETH, AND VERTIE BURTON v. CORA L. MASON AND HER HUSBAND, Z. L. MASON.

(Filed 22 September, 1915.)

Deeds and Conveyances—Conditions Subsequent—Restraint of Marriage.

Where a deed to land is clearly and unambiguously expressed, and conveys it to another, but upon a condition subsequent in general restraint of marriage, the condition, as a general rule, will be disregarded; and a conveyance of the land to C., with full covenants of warranty, but if C. should marry, the property shall revert to the grantor, is construed to be in fee simple, the condition annexed being in general restraint of marriage, and therefore void. *Miller's case*, 159 N. C., 123, cited and distinguished.

APPEAL by defendant from *Justice, J.*, at the February Term, 1915, of PASQUOTANK.

Proceedings for sale of land for division, instituted by plaintiffs before Superior Court Clerk of Pasquotank County. Defendant having pleaded sole seizin of the land in Cora L. Mason, the cause was transferred to the civil-issue docket of Superior Court of said county.

At close of plaintiff's testimony, on motion, there was judgment of nonsuit, and plaintiff excepted and appealed.

Aydlett & Simpson and J. B. Leigh for plaintiff.
Ward & Thompson for defendant.

HOKE, J. On the hearing it was made to appear that on the first day of August, 1911, T. M. Gard and his wife, Colinda, executed to their daughter, Cora L. Gard, a deed in fee simple for the house and lot in controversy, with full covenants, and that, just after the description of the property, the said deed contained the following provision: "It is understood and agreed between all the parties herein that if the said Cora L. Gard marries, this property reverts back to the said grantors, their heirs and assigns"; that, at the time of the execution of the said deed, the grantors had three children, plaintiffs, A. W. Gard and his sister, Vertie Burton, and Cora Gard, grantee in the deed, who was

then single, living on the property with the father and mother; that the mother died in 1911, the father in April, 1913; that Cora L. Gard, grantee in the deed, intermarried with her codefendant, Z. L. Mason, in February, 1913, and, after the death of the father, the other two children, A. W. Gard and his sister, Vertie Burton, instituted this proceeding against Cora and her husband, claiming that, under and by virtue of the stipulation in the deed, the title had reverted to all the children and heirs at law. Defendants contended that the stipulation was void as being in restraint of marriage, and his Honor being of that opinion, judgment of nonsuit was entered, as heretofore stated.

It is the principle very generally recognized here and elsewhere that, when an estate has been definitely conveyed to another, a condition subsequent, in general restraint of marriage, will, as a rule, be disregarded. *In re Miller*, 159 N. C., p. 123; *Watts v. Griffin*, 137 N. C., p. 572; *Otis v. Prince*, 76 Mass., 581; *Phillips v. Ferguson*, 85 Va., 1 L. R. A., 837; *Lowe v. Doremus*, 84 N. J. L., 658; *Sullivan v. Gavesche*, 229 Mo., 170; *In re Alexander*, 149 Cal., 151; 2 Devlin on Deeds, 3d Ed., p. 1792.

The instrument being free from ambiguity, the language expressing plainly and distinctly the meaning of the parties, there is no place for extraneous evidence in aid of its interpretation; *Gilbert v. Shingle Co.*, 167 N. C., p. 286, and the case presented is that of a deed with full covenants, conveying the property to *feme* defendant and containing a stipulation in the nature of a condition subsequent in general restraint of marriage and we concur in the ruling of his Honor that the stipulation is void.

We are reminded that in *Miller's case*, 159 N. C., p. 123, the provision in apparent restraint of marriage was upheld, and it is insisted that the decision is direct authority in support of plaintiff's position, but, in *Miller's case*, it will be noted that there was language on the face of the will which tended to show that a conditional limitation was intended, and much stress was given, also, to the fact that there was a limitation over, a circumstance that is usually made determinative in personal property and is always allowed much weight in cases of real estate.

Speaking to this question, in *Miller's case*, the Court said: "Even though the words used may, in strictness, be those of condition subsequent, if there be a limitation over to a third person, the courts are inclined to consider it as an estate upon limitation rather than one upon condition.

It seems that this fact of a limitation over is only allowed as controlling in cases of bequests of personalty. See notes to case of *Coppage v. Alexander heirs, supra*, reported in 38 Am. Dec., p. 159; but both Blackstone and Kent speak of it as prevailing in devises of realty also. 4 Kent, p. 126; 2 Blackstone, p. 155. But whether made determinative in cases of real property or otherwise, and whether the facts bring the

present case within the principle or not—and we are inclined to think they do (see *Stillwell v. Knapper,* 69 Ind., 558)—the fact that there is such a limitation over should always be given full and proper weight in arriving at the mind and will of the testator and determining whether the disposition made of the property shall be considered an estate upon limitation or a condition *in terrorem,* void as being in general restraint of marriage."

In our case, there is no perplexity by reason of the language used, nor is there any limitation over, but, as stated, an ordinary deed with full covenants, containing a stipulation in general restraint of marriage.

We find no error in the trial, and plaintiff's judgment of nonsuit must be affirmed.

No error.

J. I. BROWN AND WIFE v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 22 September, 1915.)

1. Telegraphs—Principal and Agent—Telephones—Local Operator.

Where the local operator of a telephone company at a point where a telegraph company has no office, is also the agent of the latter company to receive messages there and telephone them to a near-by town, to the office of the telegraph company for transmission and delivery, the receipt by the local operator of such messages is a receipt thereof by the telegraph company, making it liable for the actionable negligence of the local operator in not promptly telephoning them.

2. Same—Trials—Evidence—Statutes.

Where there is evidence tending to show that the local agent of a telephone company customarily received messages from its subscribers, to be telephoned to the office of a telegraph company at a near-by town for transmission and delivery over the latter's system, made out tickets therefor against the telegraph company and collected for the telegrams at the end of the month and remitted the money to the telegraph company, it is held sufficient to be submitted to the jury upon the question of whether the agent of the telephone company was also the agent for the telegraph company. Revisal, sec. 440(1).

3. Pleadings—Variance—Proof—Statutes.

Where the complaint in an action against a telegraph company for damages for its negligent delay in the transmission and delivery of a message alleges that the defendant received the telegram sued on at its office at A., and the evidence tends to show that it was received at B., a near-by point, and telephoned to A. by the defendant's agent there, and there is nothing to indicate that the defendant was misled or was unprepared to meet the evidence introduced, or was thereby prejudiced: *Held,* the variance between the allegation and the proof was neither material nor fatal. Revisal, sec. 515.

APPEAL by plaintiffs from *Ferguson, J.,* at the November Term, 1914, of EDGECOMBE.

Action to recover damages for mental anguish, caused, as the plaintiff alleges, by the negligence of the defendant for failure to receive and deliver a telegram.

The plaintiff introduced evidence tending to prove that the telegram was delivered to the Onslow Telephone Company at Richlands and was then transmitted to the defendant at Jacksonville. Evidence was introduced tending to prove that the telegram was never received at Jacksonville. There was also evidence tending to prove that there was some difficulty in hearing over the telephone, but the operator at Richlands testified that she communicated the message to the agent of the defendant at Jacksonville and that he told her he understood it and had received it. This was denied by the defendant.

His Honor charged the jury, among other things, as follows: "If, however, the telephone operator at Richlands undertook to deliver the message to the defendant's agent at Jacksonville, and he informed her that he couldn't hear it, and she then did not communicate the message, when another person came to the 'phone, and by that means the message was not delivered and received at Jacksonville, then I charge you that it would be your duty to find that the message was not received by the defendant company, and you would answer the first issue 'No.'" The plaintiff excepted.

And again, "The defendant contends it was not; that the phone was so difficult to hear through that he could not take the message, and that he notified the operator at Richlands of that fact, and if you should find from the evidence that when she began the conversation over the phone, delivering the messages, that she was notified that she could not be understood, to wait and he would get another party, and that she neglected to repeat the message which she was endeavoring to communicate, and only repeated three messages, then it would be your duty to answer the first issue 'No.'" The plaintiff excepted.

The jury returned the following verdict:

1. Did the defendant receive for transmission and delivery the telegram set out in the complaint? Answer: "No."

Judgment was entered in favor of the defendant, and the plaintiff appealed.

J. M. Norfleet and Gilliam & Gilliam for plaintiff.
John L. Bridgers & Son for defendant.

ALLEN, J. The liability of the defendant depends, under his Honor's charge, upon the single question as to whether the agent of the defendant at Jacksonville understood the message which the operator of the telephone company attempted to transmit, and this is free from objection, unless there is evidence that the agent of the telephone company was also the agent of the defendant telegraph company.

If there is evidence of this fact the charge is erroneous, because it prevented the jury from considering an aspect of the case favorable to the plaintiff, and which might have been determinative of the first issue in his favor.

In other words, if the agent of the telephone company was also the agent of the telegraph company, the message was delivered to the telegraph company when it was received by the agent of the telephone company, and, in our opinion, there is evidence in the record tending to sustain this position of the plaintiff.

Miss Murrill, agent of the telephone company, testified: "We did receive messages for them and made out tickets against the Western Union. We collected for the Western Union and remitted at the end of the month. I phoned those messages to the operator at Jacksonville. He advised me that the cost was $1. I was working at that time in the office of the telephone company. People came there and asked me to phone messages to the telegraph people. The telegraph people would tell us to collect the charges for them. That is all we did. The telegraph office had no other agent at Richlands. The operator at Jacksonville told me to collect the charges for all the telegrams. I had received messages before this for the Western Union. I stayed there a year after this and received a great many others for them. I collected the money for them and remitted it to the Western Union."

If this evidence is believed it goes far towards establishing the fact that the operator at Richlands was also the agent of the telegraph company, and indeed comes within the language of section 440, subsection 1 of the Revisal, defining a local agent upon whom service of process may be made as "any person receiving or collecting money within this State for or in behalf of any corporation of this or any other State or government."

The defendant says, however, that the plaintiff cannot avail himself of this evidence because of the allegation in the complaint that the telegram was delivered at Jacksonville.

This might have been a valid objection under the old forms of pleading, although it is said to be "common learning that allegations of time and place are not in general material or traversable" (*Pegram v. Stoltz*, 67 N. C., 147), but under The Code (Revisal, section 515), "no variance between the allegation in a pleading and the proof shall de deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits," and there is nothing in the record to indicate that the defendant did not have present at the trial all of the evidence that was available to it, and there is no contention that it was misled.

Of course, if an allegation of time and place is made and a party has prepared his evidence based wholly upon the allegation, and is surprised

at the trial by the offer of evidence of another time or place, the judge will and ought to give the opportunity to meet the evidence of the adverse party.

For the error pointed out a new trial is ordered.

New trial.

PHŒNIX IRON COMPANY v. ROANOKE BRIDGE COMPANY.

(Filed 22 September, 1915.)

Liens — Insolvent Corporations — Contracts — Laborer — Interpretation of Statutes.

A contractor furnishing his own teams, labor, etc., in hauling materials for the building of a bridge by a corporation having since become insolvent within the two months next preceding the date of the institution of the proceedings in insolvency, is not engaged in doing labor or performing "service of whatever character" within the meaning of Revisal, sec. 1206, giving a laborer a "first and prior lien upon the assets of such corporation," the statute not applying to independent contractors, whose loss or profits are regulated under their contract.

APPEAL by the defendant and the receivers from *Carter, J.*, at the April Term, 1915, of NASH.

Petition in the cause. From the judgment rendered the Manufacturers Finance Company, a creditor of the defendant, together with the receivers, appealed.

F. S. Spruill and L. V. Bassett for the appellants.

George V. Cowper, R. H. Lewis, Jr., for the appellees.

BROWN, J. The defendant is a corporation, chartered under the laws of Virginia, and has been declared insolvent, and receivers appointed in that State for its assets. The Virginia receiver, J. H. Schonley, and Jacob Battle were appointed ancillary receivers for the assets of the corporation in this State by order made in this proceeding. A petition is filed by Simon Foss and others whose names are in section 4 of the decree of *Carter, judge*, setting out their debts against the said defendant, and asking to be declared preferential creditors under section 1206 of the Revisal, which reads as follows:

"*Wages for two months lien on assets.* In case of the insolvency of any corporation, the laborers and workmen and all persons doing labor or service of whatever character in the regular employment of such corporation, shall have a first and prior lien upon the assets thereof for the amount of wages due to them respectively for all labor, work, and services done, performed or rendered within two months next preceding the date when proceedings in insolvency shall be actually instituted

and begun against such insolvent corporation, which lien shall be prior to all other liens that can or may be acquired upon or against such assets."

It is useless to consider the right of the receivers to appeal in a case of this kind, as the same point is involved in the appeal of the Manufacturers Finance Company, and we will, therefore, consider the question on its merits.

It appears from the findings of fact that the defendant contracted with the board of commissioners of Lenoir County to construct a bridge across Neuse River; that the defendant employed in the work of construction one of its regularly organized construction crews, together with certain unskilled helpers, hired for stipulated wages by the foreman in charge of the work.

In order to secure the transportation from its point of delivery along the railroad to the bridge of the structural steel, cement, and much of the stone entering into the construction of said bridge, the foreman of defendant entered into a contract with the petitioners, Simon Foss and others, citizens of Lenoir County, to transport the said material at the contract price of 12½ to 15 cents per hundred pounds; that a similar contract was made with others for the transportation of other material entering into the construction of said bridge by water from New Bern to the said bridge site.

These petitioners, according to the sworn affidavits filed, setting out their indebtedness, furnished teams and wagons, some furnishing one team, and some furnishing as many as four, together with the drivers for the said teams, and hauled the said material at the contract price above named, from its point of delivery along the railroad to the bridge site. The amounts due them are set out in the report of the receivers and in the affidavits filed by the said petitioners.

His Honor held that the claims of the petitioners came within the purview of the statute, and that they were entitled to a decree giving them preference over other creditors in the distribution of the North Carolina assets of the corporation. In this we think there is error.

The language of the statute is plain and free from ambiguity and expresses a single, definite and sensible meaning. This meaning is conclusively presumed to be the meaning which the Legislature intended to convey. The language used is admirably fitted to give expression to the legislative intent with respect to the favored class of creditors to which it undertakes to accord preferential treatment in the distribution of the assets of insolvent corporations, and small latitude is afforded for speculation. The favored creditors are *"laborers and workmen and all persons doing labor or service of whatever character in the regular employment of certain corporations."*

In *Rogers v. Dexter and P. Railroad Co.,* 85 Me., 372, 21 L. R. A., 528, it is said:

"Etymologically the word 'laborer' may include any person who performs physical or mental labor under any circumstances, but its popular meaning is more limited. The farmer toiling on his own farm, the blacksmith working in his own shop, the tailor making clothes for his own customer is not called a laborer. One who performs physical labor, however severe, in his own service or business is not a laborer in the common business sense. A contractor, who takes the chance of profit or loss, is not a laborer in that sense. In the language of the business world, a laborer is one who labors with his physical powers, in the service and under the direction of another, for fixed wages. This is the common meaning of the word, and hence its meaning in the statute."

See, also, *Indianapolis Co. v. Brennan,* 30 L. R. A., N. S., 85. In that case the Supreme Court of Indiana, construing a similar statute to ours, says, after quoting the *Rogers case, supra:* "Quotations in support of our contention might be made from many of the other authorities hereinbefore cited, but to do so is unnecessary, and would only serve to extend this opinion. It must follow, and we so hold, that the term 'laborers' as used in the title of the act in question, cannot be interpreted or construed to apply to a class of persons denominated and known as contractors, and was not so intended by the Legislature."

See, also *Moore v. Industrial Co.,* 138 N. C., 304; *Alexander v. Farrow,* 151 N. C., 320.

In *Fortier v. Delgado,* 59 C. C. A., 180, 122 Fed., 604, it was held that contractors for the work of loading sugar cane onto cars at a certain price per ton are not workmen or laborers employed on a plantation, within the meaning of a statute giving preference to their wages.

In *Moyer v. Slate Co.,* 71 Pa., 293, 298 (8 Words and Phrases, page 7523), it was held that the term "mechanics, workmen, and laborers employed by the company," in an act incorporating a slate company, which provides that the stockholders shall be individually liable for debts due mechanics, workmen, and laborers employed by the company, does not include a teamster using his own team and contributing his own time in hauling slate for the company for certain compensation, nor of a wagonmaker repairing wagons for the company." See, also, *Louisville, Evansville and St. Louis Railroad Co. v. Wilson,* 138 U. S., 501 (34 L. Ed.), 1023, 1025; 5 Labatt Master and Servant (2 Ed.), sec. 1946a.

The term "wages," in its legal as well as in its popular sense, has been defined in many cases, and means the compensation given by a master or employer to a hired person or employee. The law contem-

plates a hiring. Upon this theory, the word "wages" as used in the Pennsylvania statute of 9 April, 1872, relating to liens for wages, was declared by the Supreme Court of Pennsylvania to imply a hiring, and the relation of employer and employee, master and servant, and the preference given by the act cannot inure to the benefit of a contractor who does work or employs others to do it at a contract price. *Diller v. Frantz,* 17 Pa. Ca. Ct. R., 306; 8 Words and Phrases, 7369. See, also, 5 Labatt Master and Servant (2 Ed.), sec. 1940; 2 Lewis Southerland Statutory Construction, sec. 422.

In *Vane v. Newcombe & Smith, Receivers of Bankers and Merchants Telegraph Co.,* 132 U. S., 220 (33 L. Ed.), 310, the plaintiff, having contracted with the company to string, at a stipulated price per mile, telegraph wires, to be furnished by the company, on and along a line of poles owned by it, upon the completion of such undertaking, sought, in pursuance of the provisions of Revised Statutes of Indiana, secs. 5286 and 5287, giving employees of corporations "a first and prior lien upon the property of such corporation, and the earnings thereof, for all work and labor done and performed," to assert a lien for the amount due him under said contract. In discussing the matter, *Mr. Justice Blatchford,* speaking for a unanimous Court, said:

"The case was heard on these exceptions (to report of master) by *Judge Woods,* holding the Circuit Court. His opinion recites the material findings of the master, and then says: 'In the opinion of the Court, the petitioner had no lien at common law or in equity, and was not an employee of the telegraph company within the meaning of the statute referred to by the master. To be entitled to the benefits of this statute, and other of like character since enacted, I think it clear that the employee must have been a servant, bound in some degree at least to the duties of a servant, and not, like the petitioner, a mere contractor, bound only to produce or cause to be produced a certain result—a result of labor, to be sure—but free to dispose of his own time and personal efforts according to his pleasure, but without responsibility to the other party. In respect to the sums found due the petitioner, the report is confirmed; but, to the allowance of a lien, exceptions sustained.'"

See, also, *Todd v. R. R.,* 18 L. R. A., 305; *In re Clark,* 52 N. W. Rep., 637; *In re Bookbinding Co.,* 42 Atlanta, 575; *People v. Remington,* 45 Hum., 329; *Littlefield v. Morrill,* 97 Me., 505; *In re Stryker,* 158 N. Y., 526.

It is useless to quote further authorities. They are practically unanimous in holding that under the facts of this case the petitioners were not servants or employees of the defendant, but were contractors furnishing, not only their own labor and the labor of others, but that of their teams and wagons, all of which entered into the making up of the contract price for the transportation of material to the bridge site.

We are of opinion that under the statute the petitioners are not entitled to preference over other creditors of the defendant.

Let the costs be taxed against said petitioners, whose names are set out in section 4 of the decree of *Judge Carter.*

The judgment of the Superior Court is

Reversed.

W. H. MITCHELL AND WIFE ET ALS. v. AULANDER REALTY COMPANY, R. J. DUNNING ET AL.

(Filed 29 September, 1915.)

1. Corporations — Certificates — Equitable Owners — Stock Transfer — Receivers.

A purchaser of certificates of corporate stock at the sale by an administrator of a deceased owner to make assets, and deposited by the purchaser with another as collateral to his note, is the equitable owner, and may maintain a suit for the appointment of a receiver in insolvency proceedings, though the stock has not been transferred on the books of the company from the name of the original owner.

2. Corporations—Certificates—Executor's Sale—Title of Purchasers—Devises.

Where certificates of stock of a deceased owner have been sold by his executor to make assets to pay his debts, the effect of the will upon whether the legatee of the stock thereunder could have acquired it is not material as affecting the rights of the purchaser at the sale.

3. Corporations—Majority Interests—Mismanagement—Rights of Minority—Receivers—Equity.

While ordinarily the remedy for mismanagement of a corporation by its directors should be sought within the corporation, a different rule applies when the acts complained of are done by a majority and controlling interest, which can perpetuate the election of the same directors and manage the corporation for their own benefit; for then the minority stockholders are entitled to resort to a court of equity for relief.

4. Corporations—Insolvency—Proof Sufficient.

In an action by minority stockholders of a corporation to appoint a receiver in dissolution proceedings, it is unnecessary to establish a state of absolute and irremediable insolvency, under our statute; but it is sufficient to show that the majority in control are using the assets for their own benefit, receiving salaries, contrary to the provisions of the charter, when none are earned; investing corporate assets in enterprises of doubtful solvency controlled by them, and generally that the company is practically insolvent, and nothing can save it from mismanagement except the appointment of a receiver.

5. Corporations—Receivers—Court's Discretion—Appeal and Error—Practice.

The selection of a receiver for an insolvent corporation is a matter largely in the discretion of the trial judge and will not generally be re-

viewed on appeal unless this discretionary power has been greatly abused; and though the practice of appointing the plaintiff's attorney as such receiver is not commended, he will not be removed, as a matter of law, on appeal, though, as any other receiver, he may be removed upon application to the proper judge of the Superior Court. *Fisher v. Trust Co.*, 138 N. C., 102, cited and approved.

APPEAL by defendant from *Ferguson, J.*, at the May Term, 1915, of BERTIE.

Motion in this cause for appointment of a receiver. His Honor appointed a receiver for the defendant corporation, from which order the defendants appealed.

Pruden & Pruden, Winborne & Winborne, Gilliam & Davenport, J. B. Martin, S. Brown Shepherd, Alexander Lassiter for the plaintiffs.

Smith & Banks, Winston & Matthews, R. C. Bridger for the defendants.

BROWN, J. This action is brought by the plaintiffs as stockholders in the defendant corporation for the purpose of dissolving it and having its assets distributed according to law, and to that end they ask that a receiver be appointed.

The defendants offer four objections to the relief sought by the plaintiffs, towit:

1. For the reason that the plaintiffs were never stockholders in the defendants' corporation, according to its by-laws, and that none of the stock of the said corporation was in the possession of the plaintiffs or appeared in their names on the books of the corporation, but was held as a collateral for a debt due by plaintiffs to a disinterested party at the beginning of the action.

2. For the reason that plaintiffs have forfeited all of the rights they had under the will by bringing this action, and that whatever estate was devised to them under the will was a conditional estate—condition subsequent—which defeated the estate when this action was brought.

3. For the reason that plaintiffs did not first seek redress for their alleged grievances within the corporation before the board of directors and stockholders before bringing this action.

4. For the reason that there is no insolvency in the management of this corporation.

We will consider them in the order named.

First. It is found as a fact that the stock claimed by the plaintiffs was the property of A. J. Dunning, deceased, and that in order to pay debts the stock was sold at public auction, and was purchased by the plaintiffs, and the certificates delivered to them. They deposited the certificates with one Mitchell as collateral security for plaintiffs' notes.

The stock has never been transferred to the plaintiff upon the stock ledger of the defendant corporation. It is, therefore, contended that the plaintiff has no title to the stock sufficient to maintain this action. There is no merit in this contention.

The plaintiffs are the equitable owners of the stock and it could be subjected to the payment of their debts, although not transferred upon the books of the corporation. The by-laws of the corporations requiring such transfers, it is generally understood, are made for the purpose of protecting the corporation, and has no effect upon the legal transfer of the ownership of the stock.

Millions of shares of stock in corporations are annually deposited with brokers as collateral security by the simple indorsement of the name of the owner upon the certificate, without any transfer upon the books of the company, and no one gainsays the fact that the broker acquires good title to the stock as security for his loan, and that the real owner may not only vote it at stockholders' meetings, but sue on it if necessary to protect his interests.

The exact point has been decided in the case of *Reinhardt v. Telephone Co.*, 71 N. J. Eq., page 70, in which it is held that, "Where the complainer in fact owned stock in the defendant corporation, he could sue for the appointment of a receiver for the corporation in insolvency proceedings, though the stock stood in the name of the broker by whom it was purchased for complainer." In the opinion of *Chancellor Pitney* many authorities are cited in its support.

Second. The terms of the will of A. J. Dunning, devising this stock to the plaintiffs, have no effect whatever upon their title, and, therefore, the question as to whether the plaintiffs took a conditional estate and that the subsequent condition defeated their estate when this action was brought, is of no value. It is admitted that the stock was sold by the executors to pay the debts of their testator, and the purchasers at the sale acquired a title independent of the will.

Third. It is a general rule, applicable to all corporations of this character, that individual stockholders, in their own name, are not the proper parties to assert the rights of the corporation. The action should generally be brought by and for the corporation itself. If its officers or other stockholders fail to do their duty in that respect, the remedy is, as a general rule, to be sought within the corporate organization. *Moore v. Silver Mining Co.*, 104 N. C., 534.

But it is well settled that if the alleged wrong is being perpetrated by a majority of the shareholders, who can perpetuate it by electing directors in their own interests at each successive election, and thus manage the corporation for their own benefit, then the minority are entitled to resort to a court of equity for redress. *Brewer v. Boston Theater Co.*, 104 Mass., 378.

In this case it is alleged and found as a fact that the control and management of the business of the defendant corporation is in the hands of these codefendants; that they control the majority of the stock; that some of them are enjoying the use and benefit of a part of the property of the company; that they are paying themselves salaries in direct disobedience to the charter of the company, which prohibits such salaries until dividends are earned and paid; that these defendants are not collecting the principal or the interest due the defendant corporation; and that its condition from the present management is such as to bring about the insolvency of the company.

The plaintiffs aver that they cannot obtain any relief from the corporation itself; that they are denied means of knowing the condition of the corporation and how its assets are being applied; that these defendants are the officers and managers of the corporation; that they are cutting and selling timber belonging to it, selling real estate and other property, collecting the money and refusing to account to the plaintiff stockholders for any of their acts.

It requires no argument, we think, to prove that upon these allegations, which are found to be true by the court below, the plaintiffs, as minority stockholders, have a right to maintain this action.

Fourth. In order to justify the appointment of a receiver under the allegations set out in the complaint, and the facts found, it is not necessary that the plaintiff should establish a state of absolute and irremediable insolvency upon the part of the defendant corporation. Our statute declares that corporations may be dissolved by civil action instituted by the corporation or stockholders or creditors, when the corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, or *be in imminent danger of insolvency, etc.*

The court finds, and the evidence establishes the fact, that at the time of the death of A. J. Dunning, Sr., who founded the corporation, the assets of the defendant company consisted of real estate, solvent credits, and stock in the Bertie Cotton Oil Mill; that the individual defendants are the majority stockholders of the Aulander Realty Company, and have had charge and control of the said property and its assets; that it further appears that W. S. Dunning, secretary and treasurer of the said company, purchased, before the death of A. J. Dunning, Sr., from the said company a lot of land at the sum of $2,000, in the year 1909, which is secured by four notes of $500 each; and no part of the principal has been paid upon the said indebtedness, and no interest collected.

And that another piece of property valued at $7,000 is occupied by R. J. Dunning, president of the defendant company, and there has been no income to the company derived from said property other than salary

or allowance as may have from time to time been charged for his services as president of said company.

It is further found that a portion of the assets of said company consisted of $13,000 credit, the indebtedness of the brick company, now J. J. House & Co., and no part of the principal of the said debt has been collected and no interest.

It further appears that four of the five shares of the Bertie Cotton Oil Mill have been disposed of.

And it further appears that the control and management of the business of the Aulander Realty Company, being in the hands of these directors, some of whom are enjoying the use and benefit of a part of the property of the company, and the management not collecting any of the principal or interest due defendant corporation, that its condition from the present management is such as to threaten loss, if not eventually insolvency of the company.

It further appears that these codefendants, R. J. Dunning, W. S. Dunning, and A. J. Dunning, Jr., officers of the defendant corporation, without any legal authority and greatly to the injury of the Aulander Company, took $15,000 of the assets of the Aulander Company and invested it in the stock of the R. J. Dunning Company, a corporation of doubtful solvency, in which these officers of the Aulander Company are personally interested.

It further appears that the charter of the Aulander Company provides that no fees or salaries shall be paid its officers until the company was able to declare and pay dividends on the preferred stock. Nevertheless, these officers permitted R. J. Dunning to take charge of and use for his private benefit a house and lot of the company, worth $7,000, as his salary as president of the company.

Taking all these facts to be true, as found by the judge, we think it almost beyond question that the Aulander Company is practically insolvent, and that nothing can save it from the mismanagement of the defendants except the appointment of a receiver.

It was contended upon the argument that it was error in the judge below to appoint Mr. Gilliam, one of the plaintiff's counsel of record, receiver. There is no such assignment of error in the record. Nevertheless, we will take notice of it.

It is not necessarily wrong to appoint an attorney in the cause receiver, although it is a practice not to be commended unless done by consent. Mr. High says: "It is not regarded as an abuse of judicial discretion to appoint as receiver the attorneys of the respective parties to the cause, and the court, in making such appointment, will not be interfered with upon appeal." High on Receivers, 69.

This matter is fully discussed in *Fisher v. Trust Co.*, 138 N. C., 102, and we commend to the judges and profession what is there so well said

by *Mr. Justice Connor.* The selection of a receiver is largely in the sound discretion of the judge of the Superior Court, and such discretion will not generally be reviewed unless it has been greatly abused. In case there is just ground for it, a receiver can always be removed upon application to the proper judge.

Affirmed.

THE FARMERS COTTON OIL COMPANY v. BLUE RIDGE GROCERY COMPANY.

(Filed 29 September, 1915.)

1. Courts, Special—Legislative Powers—Constitutional Law.

Section 27, Article IV of our Constitution should be construed with sections 12 and 14 thereof, and the latter sections modify the first named so as to authorize and empower the Legislature to establish special courts in cities and towns and confer jurisdiction upon them without regard to its provisions and limitations.

2. Same—Process to Other Counties—Justices of the Peace—Statutes.

An act establishing the County Court of Wilson County declared the same to be a court of record, provided for an official seal for the court and for a judge and solicitor, each to hold office for stated terms at specified salaries, and to take oaths similar to such positions in the Superior Courts; and conferred concurrent jurisdiction with the Superior Courts and justices of the peace in certain criminal and civil matters; and that process issue out of said county under its seal "as is now provided by law in cases of processes issuing from the Superior Court." *Held*, civil processes issuing from the court, prior to chapter 11, Laws of 1915, are valid when issued to other counties, and when falling within the jurisdiction conferred, though the matter involved, in civil actions, falls within the concurrent jurisdiction of justices of the peace, upon whom such jurisdiction has not been conferred, except where one of several defendants resides in the county. Revisal, sec. 1447, has no application.

WALKER, J., dissents.

APPEAL by plaintiff from *Carter, J.*, at the June Term, 1915, of WILSON.

Civil action, heard on appeal from the county court of Wilson County, and on motion to dismiss. A very succinct statement of case, making clear presentation of the question raised, is given in briefs of counsel; that of appellant being as follows:

"The action was instituted in the county court for Wilson County. On 15 December, 1914, the plaintiff, a corporation with its home office in Wilson County, instituted this action against the defendant, a corporation, whose home office is in Buncombe County. The summons, under the seal of the county court for Wilson County, was served on the defendant by the sheriff of Buncombe County on 18 December, 1914; the complaint declared on a breach of contract theretofore existing be-

tween the plaintiff and the defendant, and demanded the recovery of $166.25 as damages for the breach of contract.

"In the county court for Wilson County the defendant entered a special appearance and moved to dismiss the action for that the court was exercising a jurisdiction concurrent with the jurisdiction of justices of the peace of Wilson County, and, under sections 1447 to 1450 of the Revisal, could not send its summons out of Wilson County, and having never properly acquired jurisdiction of the person of that defendant, did not have power to try the case. The motion was overruled, the defendant excepted, and the trial of the case was had on its merits, resulting in a judgment adverse to the defendant, from which judgment the defendant appealed to the Superior Court of Wilson County.

"The special appearance and motion to dismiss by the defendant were renewed in the Superior Court, and his Honor, *Judge Carter,* sustained the motion of the defendant; whereupon the plaintiff excepted to the judgment dismissing the action, and appealed to the Supreme Court.

W. A. Lucas for plaintiff.
Mark W. Brown and F. D. Swindell for defendant.

HOKE, J. In *S. v. Baskerville,* 141 N. C., p. 811, it was in effect decided that section 27, Article IV of the Constitution, conferring jurisdiction on justices of the peace, is so modified by sections 12 and 14 of the same article as to authorize and empower the Legislature to establish special courts in cities and towns and confer jurisdiction upon them without regard to the provisions and limitations of the former section.

Pursuant to the principle declared in this case and others of like import, the Legislature, at the Special Session, 1913, Public-Local Laws, Extra Session, 1913, ch. 239, established "The County Court of Wilson County," declaring same to be a court of record; provided for a judge to hold his office for two years, at a salary of $1,200 per annum, and to take the same oath as a Superior Court judge; also for a solicitor, at a salary of $600 per year, to take an oath similar to that of solicitors of the Superior Court.

It provides, also, for an official seal, and conferred jurisdiction of certain criminal causes and also original and concurrent jurisdiction with the Superior Court of Wilson County and of justices of the peace of all notes and other contracts, etc., where the amount involved shall not exceed $500, and all actions sounding in tort where the value of the property in controversy does not exceed $200, of foreclosures and mortgages, where "no defense is set up," etc. And in all criminal actions of which the court has jurisdiction, justices of the peace, mayors or incorporated towns, etc., when acting as committing magistrates, shall

bind the parties over to said county court, where probable cause is shown. After making minute regulations as to terms of said court, the jurisdiction of the same and procedure therein, the act, sec. 25, contains provision, "That whenever any process is issued out of said court, directed to any county other than the county of Wilson, either civil or criminal, said process shall bear the seal of said court, as is now provided by law in cases of processes issuing from the Superior Court."

Having regard to the authority and jurisdiction conferred and from the clear import of this, the closing section of the act, we think it was clearly contemplated and provided that process from this court, under the seal thereof, should run into any county of the State in any cause of which the court had jurisdiction.

There is nothing in our organic law which inhibits the enactment of such a statute, and, in our opinion, under the law as it then existed, the judgment rendered against the defendant should have been upheld.

It is argued, in support of his Honor's ruling, that in *Rhyne v. Lipscombe,* 122 N. C., p. 656; *S. v. Lytle,* 138 N. C., 741, and other cases, it is strongly intimated, if not decided, that the jurisdiction conferred on the justices of peace by section 27, Article IV of our Constitution could not be altered or interfered with to the extent undertaken by this law. But, as shown in *Baskerville's case,* the question before the Court and which was decided in *Rhyne v. Lipscombe* was on the constitutional authority and jurisdiction of our Superior Courts as an appellate and supervising tribunal over courts of justices of the peace and all other courts inferior to the Supreme Court which the Legislature might establish. Construction of section 27 of Article IV, as affected by sections 12 and 14 of said article, vesting the Legislature with power in certain cases to establish special courts, was in no way involved. And, as stated in *S. v. Lytle, supra,* the modification in section 27, by these former sections 2-12 and 14, was then treated as an open question, determined later in *S. v. Baskerville.*

It was further urged for appellee that, as to amounts coming within a magistrate's jurisdiction, as in this case, the court was without power to send its process beyond the county of Wilson, by reason of section 1447, Revisal; that prohibiting a justice of the peace from sending process out of his own county unless "one or more *bona fide* defendants shall reside in and one or more *bona fide* defendants shall reside out of the county," etc.

But this section, in express terms, applies only to justices of the peace, and there was, at that time, nothing in this or any cognate section of the Revisal which would extend to or include a court of this character.

The matter has now ceased to be of much practical moment, as the General Assembly of 1915, recognizing that the power in these local courts to send its process for small amounts into any county of the

State might, at times, be abused and become the source of great hardship, passed an act, chapter 11, Laws 1915, providing "that the process of any recorder's court, county court or other court inferior to the Supreme Court of the State, when said court is exercising jurisdiction of a justice of the peace in civil matters, shall run only as does the process of the court of a justice of the peace for the county where such court is located, and that the act shall not affect actions pending at the date of its ratification. The act is entitled "An act to restrict the running of process of courts inferior to Supreme Courts."

Having regard to the language of the statute and its evident purpose, it is clear that the Legislature intended to provide, and has provided, that in civil matters processes of these local courts shall not run into other counties in those causes that were within the jurisdiction of a justice of the peace, except where a justice could so send valid process.

This will be certified, that the judgment of the Superior Court be reversed, and judgment entered for plaintiff.

Reversed.

WALKER, J., dissenting.

S. R. FOWLE & SON v. D. C. WARREN.

(Filed 29 September, 1915.)

Deeds and Conveyances—Tax Deeds—Color of Title—Disseizin—Adverse Possession—Declarations—Evidence.

Where the grantee under a sheriff's deed for taxes relies upon his deed as color of title, and it appears that he has lived on the lands with the original owner, since deceased, cultivating them, within the seven years period, evidence tending to show declarations of the original owner, made since the tax deed, to the effect that the lands belonged to the grantee therein, who was permitting him to remain there until his death, and that he could not sell the timber growing thereon for that reason, is sufficient to show disseizin of the original owner of the tax title, presenting a question for the determination of the jury; and in this case it is held that the testimony of the declarations of the original owner was sufficient evidence of acknowledgment of the tax title from the date of the tax deed.

APPEAL by defendant from *Justice, J.*, at the February Term, 1915, of BEAUFORT.

Action to remove a cloud from title. In 1898 Isaiah Rowe was the owner in fee of the land in controversy. On 1 May, 1898, the land was sold for taxes and on 3 March, 1899, the sheriff executed a deed therefor to the defendant Warren. Warren failed to make the affidavit and to give the notice required by sections 64 and 65, chapter 169,

Laws of 1897. Warren was the nephew of Rowe, and Rowe continued to live on the land until a short time before his death in July, 1901, and this action was commenced in January, 1907.

The defendant relied upon the tax deed as a valid conveyance of the land, and, if not valid, contended that it was color of title, and that he had held adversely under it for more than seven years.

The plaintiff claims the land under conveyances from the heirs of Rowe.

The defendant offered evidence tending to prove that he entered into possession of the land as soon as he got the tax deed; that he commenced farming on it, cutting rail timber, and cultivating it and using it like any other property.

At the conclusion of the evidence his Honor instructed the jury if they believed the evidence to answer the first issue, as to the ownership of the land, in favor of the plaintiff, and the defendant excepted.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

Ward & Grimes for plaintiff.
Small, MacLean, Bragaw & Rodman for defendant.

ALLEN, J. It was held, upon the former appeal in this action (166 N. C., 446), that the tax deed under which the defendant claims was color of title, and it was said in the opinion: "The tax title being merely color of title, for the reason above given the burden was on Warren to show that he acquired the adverse possession prior to the death of Isaiah Rowe. It is true, he testified that he 'entered into possession of the land,' but his evidence is that Isaiah Rowe was then living on the land, as he had been for many years previous, and that he continued there until a very few days of his death. Warren did not show any act or assertion of adverse possession to Rowe, who remained on the land, and there is no evidence that he paid rent or otherwise acknowledged the title and possession of D. C. Warren. There is no act of disseizin shown. From all that appears, both continued to live on the land as prior to said sale, without any change in the attitude of the parties to the possession. There is no evidence of the exclusive possession of Warren or any acknowledgment on the part of Rowe."

Adhering to this statement of the law, it follows that the charge of his Honor is erroneous, if there is evidence in this record that Rowe remained in possession of the land by permission of the defendant Warren, and acknowledged his title and possession.

A. H. Pippin, a witness for the defendant, testified on the second trial: "I live near Core Point. I knew Isaiah Rowe; did not know all of the Rowe land in controversy. I know the piece of land. I know

about the fact of its being sold for taxes and Mr. Warren buying it. After he got the deed he cut timber off it and cultivated the land. It was part cleared and part woods. There was a small piece cleared up, about five or six acres. I had a conversation with Mr. Rowe about it, went to him one time to rent his timber, and he told me he could not rent it, it belonged to Mr. Warren; and I told him it looked like he was living on the place, and I thought it belonged to him, and he told me Mr. Warren had bought it for taxes, and that it belonged to him; and I spoke to him about his living on the place, and he told me Mr. Warren was letting him stay there his lifetime without objection. He lived there in the house until a right short time before his death."

This evidence was not in the record on the former appeal.

It is true, the witness Pippin does not state the exact time when he had the conversation with Rowe, but his evidence is susceptible of the construction that Rowe acknowledged the title of Warren from the date of the purchase at the tax sale, and the defendant was entitled to have it considered by the jury.

New trial.

FIRST NATIONAL BANK OF HENDERSON v. S. H. JOHNSTON.

(Filed 29 September, 1915.)

1. **Bills and Notes—Negotiable Instruments—Signature on Back—Indorsers—Dishonor—Notice.**

One who signs his name on the back of a negotiable instrument, without indication that he did so in any other capacity, is deemed an indorser and is entitled to notice of dishonor.

2. **Bills and Notes—Negotiable Instruments—Indorsers—Dishonor—Notice—Waiver.**

Notice of dishonor may be waived by an indorser of a negotiable paper before or after maturity thereof by express words or by necessary implication, and when so waived, notice of dishonor need not be given. Revisal, secs. 2239, 2259, 2260, 2261, 2270.

3. **Same—Extension of Time—Maturity—Agreement—Guarantors of Payment.**

Where it is expressly agreed upon the face of a negotiable note given by the maker to the bank that "the subscribers and indorsers hereby agree to continue and remain bound . . . notwithstanding any extension of time granted to the principal, hereby waiving all notice of such extension of time," and upon maturity an indorser thereon agrees to a further extension, and notice of dishonor is not given him when the instrument again matures, and he seeks to avoid liability for that reason: *Held*, his having notice of dishonor and nonpayment of the note at its original maturity and consenting to the extension make his liability on the paper absolute, as a guarantor of payment, not requiring further notice of dishonor to be given him.

WALKER, J., concurs in the result; CLARK, C. J., dissenting.

BANK *v.* JOHNSTON.

APPEAL by plaintiff from *Ferguson, J.*, at the May Term, 1915, of VANCE.

Civil action, brought to recover on the following promissory note:

$600. HENDERSON, N. C., March 30, 1914.

Ninety days after date, for value received, I promise to pay to the First National Bank of Henderson, N. C., or order, six hundred dollars, negotiable and payable at said bank, with interest at the rate of six per cent per annum, after maturity, having deposited with said bank as collateral security for payment of this or any other liability or liabilities of . . . to said bank, due or to become due, or which may hereafter be contracted, the following property, viz.:

Two notes, $250 each, signed by M. W. and Nannie Askew, secured by real estate, with such additional collateral as may from time to time be required by the president or cashier of the First National Bank of Henderson, N. C., and which additional collateral I hereby promise to give at any time on demand, and if not so given when demanded, then this note to become due and payable at once, with full power and authority to said bank to sell, assign, and deliver the whole or any part thereof, or any substitutes therefor, or any additions thereto, at any broker's board, or at public or private sale, at the option of said bank, or its president or cashier, or its or their or either of their assigns, on the nonperformance of this promise, or the nonpayment of any of the liabilities above mentioned, or at any time or times thereafter, without advertisement or notice, which are hereby expressly waived; and upon such sale the holder hereof may purchase the whole or any part of such securities discharged from any right of redemption and by these presents.

And after deducting all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so to be made, to pay any, either or all of said liabilities to said bank or its assigns, as its president or cashier, or it or its or their or either of their assigns shall deem proper, returning the overplus, if any, to the undersigned. And the undersigned agrees to be and remain liable to the holder hereof for any deficiency.

The subscribers and indorsers hereby agree to continue and remain bound for the payment of this note and all interest and charges thereon, notwithstanding any extension of time granted to the principal, hereby waiving all notice of such extension of time.

(Signed) M. H. JOHNSTON.
(Signed) R. H. JOHNSTON.

Interest paid to August 27th.
Interest paid to September 26th.
Interest paid to November 15th.

The name of defendant written on back of note as indorser.

No notice of dishonor or of nonpayment was given by the plaintiff to the defendant at or before maturity. The defendant pleaded this want of notice as a bar to any recovery against him.

The court rendered judgment in favor of the defendant, and the plaintiff appealed.

T. T. Hicks for plaintiff.

A. C. and J. P. Zollicoffer for the defendant.

BROWN, J. The following statutes are in point:

Revisal, 2239: "Except as herein otherwise provided, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged."

Revisal, 2259: "Notice of dishonor may be waived either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied."

Revisal, 2260: "Where the waiver is embodied in the instrument itself, it is binding upon all parties."

Revisal, 2261: "A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver, not only of a formal protest, but also of presentment and notice of dishonor."

Revisal, 2270: "A person secondarily liable on the instrument is discharged by any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

It is well settled that a surety on a promissory note or bond is not entitled to notice of dishonor or nonpayment, but one who places his signature upon the back of a commercial paper without indication that he signed in any other capacity is deemed an indorser, and is entitled to notice of dishonor. *Houser v. Fayssoux,* 168 N. C., 1; *Bank v. Wilson,* 168 N. C., 557.

This notice of dishonor may be waived by the indorser before or after the maturity of the note by express words or by necessary implication. When so waived, notice of dishonor need not be given.

The facts in this case are that the principals to the note paid interest on the same to 15 November, 1915, and that no notice of dishonor or nonpayment by the makers was given by plaintiff to the defendant, but that plaintiff on 9 December, 1914, placed said note for collection in the hands of its attorney, who then at once notified the makers and the

defendant S. H. Johnston that it had not been paid, and demanded payment of all of them; that said defendant S. H. Johnston at once called on said attorney and brought with him Mr. Richardson, who was considering taking up the same with the collateral, and said Richardson took the note and collateral to examine it and later returned it and declined to take it.

It is contended by the plaintiff that notice of dishonor was waived by the indorser by the express words of the instrument, and that having consented to such indefinite extensions of payment as the principals to the note and the plaintiff should agree upon, the indorser is not entitled to notice of nonpayment.

The defendant contends that he consented to the extensions of time granted the principals, and, consequently, he was bound by such waiver *up to 15 November, 1915.* At that time the extension ended, the note matured, and the defendant, indorser, was then entitled to notice of nonpayment and dishonor.

The authorities seem to hold that where the indorser consents in advance of maturity to extensions of the time of payment of the note, he thereby waives his right to receive notice of dishonor and presentment for payment. *Worley v. Johnson,* 33 L. R. A., 641, notes.

In Daniel on Neg. Inst. (6 Ed.), by Calvert, sec. 1106, it is said: "Where the indorser agrees to an extension of time of payment, it waives demand, protest, or notice."

In *Cady v. Bradshaw,* 116 N. Y., 191, it is held that where the indorser consented that time of payment be extended a year he in effect waived notice of dishonor and demand for payment, citing Parsons on Notes and Bills, 587, and many adjudications in the opinion. *Barclay v. Weaver,* 19 Pa. St., 397.

The point is expressly decided in *Ridgeway v. Budd,* 13 Pa. St., 208, where it is held that "if an indorser of a promissory note agrees to extend the time of payment beyond the maturity of the note, such agreement amounts to a guaranty that he will hold himself bound at the expiration of the period agreed upon by him." In the opinion it is said: "This is a distinct guarantee that he (the indorser) will hold himself bound at the end of thirty days after maturity, and is within the case of *Foster v. Jurdison,* 16 East, 104, establishing that under like circumstances the holder was not bound to give notice," citing Story on Prom. Notes, 314; *Williams v. Brabst,* 10 Watts, 111; *Scott v. Green,* 10 Bar., 103; *Clark v. Devlin,* 3 Bos. & Pul., 365.

The reason underlying this rule is given in the case of *Sheldon v. Horton,* 43 N. Y., 93, and that is because when the indorser consents to an extension of payment, he has notice that the note is not paid at its maturity, and by consenting to an extension his liability then becomes

absolute as a guarantor, "and no subsequent demand or notice at any time is required."

In *Amoskeag Bank v. Moore,* 37 N. H., 539, it is held: "An agreement between the holder and indorser of a promissory note, made before its maturity, that the time of payment shall be extended, is a waiver by the indorser of demand and notice; and in such case no demand is necessary at the expiration of the extended time."

Referring to the effect of the indorser's consent to the extension of time for payment, the Court says: "This constitutes a waiver both of demand and notice, precisely as if they had expressly indorsed with such waiver; and thereby the contingent character of their liability as indorsers, depending upon the demand of payment upon the maker, and notice of nonpayment, is converted into one of an absolute character *as of guarantors.* Their liability being thus fixed and absolute at the maturity of the note, by reason of their indorsement and the waiver of demand and notice, the fact that no demand was made at the expiration of the extended time is immaterial, as is also the evidence offered in relation to their subsequent promise to pay. The indorsement and the waiver render them liable to pay, with or without subsequent promise, and with or without a demand upon the maker at any time. See, also, *Glaze v. Ferguson,* 48 Kan., 157; *Bank v. Ryerson,* 23 Iowa, 509; *Bank v. Dibrell,* 91 Tenn., 301; *McMonigal v. Brown,* 45 Ohio State, 499."

We are of opinion that upon the facts agreed the plaintiff is entitled to judgment.

Reversed.

WALKER, J., concurs in result.

CLARK, C. J., dissenting: It would seem that the court below ruled correctly. Rev., 2239, provides: "Except as herein otherwise provided, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged."

Rev., 2259, provides that notice of dishonor may be waived, and section 2260 that such waiver may be embodied in the instrument. Rev., 2270, provides that "A person secondarily liable on the instrument is discharged by any agreement binding on the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

The agreement in this instrument to which the indorser is a party, by writing his name on the back thereof, provides: "The subscribers and indorsers hereby agree to continue and remain bound for the pay-

ment of this note and all interest and charges thereon, notwithstanding any extension of time granted to the principal, hereby waiving all notice of *such extension of time.*" It is clear, beyond controversy, that the waiver of the indorser was to the granting of an extension of time and to nothing more. Without such waiver he would have been discharged by the extension of time granted by the plaintiffs to the principal debtor. It is clear that he entered into no contract whatever to waive notice of dishonor by nonpayment at the maturity of the note, to which notice he was entitled by Rev., 2239.

The object of giving notice of dishonor by nonpayment as required by Rev., 2239, is that the party secondarily liable may take prompt steps to secure himself in the manner provided by law. If this is so when the note falls due at the original date, there is still more reason that such notice shall be given when by reason of extensions, of which the indorser knows nothing, the note falls due and is then dishonored without his knowledge. Presumably he knows when the original note falls due, but even in such case the statute requires that notice shall be given him, if the note is not paid at maturity, for the presumption is that it will be paid. For a far stronger reason, when, as in this case, the indorser has waived a release which would have come to him by an extension of time, the indorser is entitled to notice of nonpayment at the maturity of the note, which occurs by reason of the fact that the bank refuses to again extend the note. The holder knows of this date. The indorser does not. The indorser in this case has done nothing expressly or impliedly to waive notice of nonpayment, and should have had it, as Rev., 2239, requires.

It is true that in other States there have been conflicting decisions on this point. The statute varies in different States, and the decisions also, most of which were prior to the adoption of the Uniform Negotiable Instruments Law. We have no statute, and no decisions, depriving the indorser of notice of the nonpayment of a negotiable instrument when it falls due when, as in this case, he has not waived the same. His waiver of release by reason of any extension of time by the bank made it all the more incumbent upon the bank to give notice of nonpayment when the bank, by its own act in refusing further extension, has fixed a new date for the maturity of the note, of which the indorser has no notice. If given notice, the indorser would have had the right to take up the note, and could have taken steps to secure himself, which may now be beyond his power.

A waiver of release by an extension is not a waiver of notice of nonpayment, which puts an end, without the knowledge of the indorser, to such extension.

GREENE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 29 September, 1915.)

1. Carriers of Passengers—Negligence—Evidence—Train Records—Corroborative Evidence.

Where damages are sought for a personal injury alleged to have been inflicted by reason of defendant having stopped its passenger train at an unusual stopping place, where the plaintiff alighted therefrom, exception that the conductor testified from his record of the train alone that the place was the usual one will not be sustained, when it appears that he testified to the fact directly and then stated that the train sheet, which he then examined, would have shown had it stopped at an unusual place, which it did not show.

2. Carriers of Passengers—Instructions—Inferential Evidence—Appeal and Error.

Where, in an action to recover damages for a personal injury alleged to have been inflicted on a passenger while alighting from defendant's passenger train, there is evidence tending to show, as contended for by the plaintiff, that the injury occurred when the train stopped at an unusual place, and for the defendant that it did not stop until it got to its usual stopping place beyond, the jury has a right to accept as true a part of the plaintiff's evidence, and find that the injury occurred at the place contended for by him, but before the train stopped, and a contention of the parties stated by the court to this effect is not erroneous, though there is no direct evidence thereof.

APPEAL by defendant from *Ferguson, J.*, at the April Term, 1915, of HERTFORD.

Action to recover damages for personal injury, the plaintiff alleging and offering evidence tending to prove that on 15 March, 1912, he became a passenger on the train of the defendant at Norfolk, with his destination at Eure; that he reached Eure at night; that the train stopped at an unusual place, about one hundred yards before the regular stopping place was reached; that he was notified to leave the train, and that he did so; that the place where he alighted was unsafe, and he fell down an embankment and was injured.

The defendant offered evidence tending to prove that the train stopped at the regular place, and that the plaintiff was not injured.

The jury returned the following verdict:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: "No."

Judgment was entered in favor of the defendant, and the plaintiff appealed.

E. T. Snipes for plaintiff.

Pruden & Pruden and S. Brown Shepherd for defendant.

ALLEN, J. The plaintiff considers two assignments of error in the brief, and under our rules all others are deemed abandoned.

The first of these is to the admission of the evidence of Mr. Pitt, the conductor, which is objected to on the ground that he did not testify from his own knowledge, but from his records. It does not appear from the record that any exception was taken to this evidence, but if the exception was duly entered, the record does not bear out the statement that he was not speaking of his own knowledge. He says, among other things: "I was on the train 15 March, 1912; was in control of train. I remember stopping in Eure; am not positive who got on or off. The train made its usual stops and at usual places. I got off with lantern, as I always do. I stand between white and colored car. He did not get off there. I know the train did not make an unusual stop. I was telling what happened at Eure that night. I do know that we three got off with our lights, if there were no others. I know for a fact; know that the train stopped at Eure. If train had made an unusual stop a record would have been made of it. I don't say I remember everything that happened that night, but nothing unusual happened."

The second assignment of error is that his Honor presented a contention of the defendant that the plaintiff attempted to get off the train before being invited to do so, and while it was in motion, and this is based upon the contention that there was no evidence to support this view. There is no direct evidence of the fact, but the circumstances relied on by the defendant justified submitting it to the jury.

The evidence of the defendant tended to prove that the train stopped at the usual place, and the evidence for the plaintiff that he got off or fell from the train before the train reached the usual stopping place.

The jury had the right to accept a part of the plaintiff's evidence and reject other parts of it, and if the train stopped at the usual place and the plaintiff stepped or fell off the train, where he says he did, the train must have been in motion at that time.

His Honor charged the jury fully, and gave practically all the instructions asked by the plaintiff, and the jury upon a fair charge has answered the issue against him.

We find

No error.

DORA M. NEWSOME AND HUSBAND, J. C. NEWSOME, v. BANK OF AHOSKIE.

(Filed 29 September, 1915.)

1. Bills and Notes—Banks and Banking—Collateral Notes—Other Indebtedness—Contracts.

Where a collateral note given to the bank for borrowed money provides that the collateral may be appropriated by the bank to the "extinguishment of this note or of any other liability of the undersigned to the bank, whether now existing or hereafter arising," etc., the provision of the note applies only to transactions directly between the maker of the note and the bank, and not to notes given by the maker to third persons and thereafter purchased by the bank.

2. Same—Officers—Knowledge Implied—Trusts and Trustees.

A director of a bank is affected with knowledge of the transactions between the bank and those dealing with it in the course of its business; and where the proceeds of sale of collateral to a note the bank holds is more than sufficient to pay off the indebtedness of the maker, the bank holds the surplus in trust for the maker; and it would be a breach of trust, not permissible, for it to allow one of its directors to sell a note he holds of the same maker to the bank, and apply this surplus to its payment under a general provision in the note, with collateral, that the collateral was likewise applicable to the maker's general indebtedness to the bank.

3. Bills and Notes—Banks and Banking—Collaterals—Trusts and Trustees—Breach of Trusts.

The collateral given with a note to the bank is held by the bank in trust for the maker, and the bank is not permitted to divert the surplus of the proceeds of the sale of the collateral contrary to the terms of the trust as expressed in the note.

4. Same—Bank Directors—Fraud—Releasing Trust Fund—Creditors' Bill.

A plaintiff bank having acquired from one of its directors a note indorsed by the director, upon the agreement that it would first exhaust the collateral to another note given by the same maker to the bank, alleged fraud of the maker of the note in procuring the collateral, and attempted to convert the action into a general creditors' bill, and subject the surplus of the collateral to the payment of the first note, which did not come within the terms of the latter one. It appeared that the bank was the only creditor prosecuting the action, and it is held that the bank was required to first relinquish the collateral it held as trustee before it would be permitted to institute an action of this character.

5. Bills and Notes—Banks and Banking—Trusts and Trustees—Division of Funds—Receivers—Accounting.

Where a note to a bank has been paid in full by the sale of collateral thereto, and a surplus then remains in the hands of the bank, which it wrongfully seeks to apply to other indebtedness of the maker, and it appears that the surplus has been placed in the hands of a receiver pending an action brought by the maker of the note against the bank, it is held that the maker is entitled to a decree that the receiver pay over to him the ascertained surplus; and a personal judgment should be entered in the bank's favor against the maker for the amount due by him. And it not appearing in this case whether the maker or receiver has paid the original obligation of the maker to the bank, an accounting between them will be ordered.

NEWSOME *v.* BANK.

APPEAL by plaintiff from *Connor, J.*, at the July Term, 1914, of HERTFORD.

Civil action, tried upon these issues:

1. Did R. E. Cowan, in November, 1907, sell to J. C. Newsome and make and deliver to him a deed for the land described in the deed from R. E. Cowan to Dora M. Newsome, of record in Book 32, page 415, in the office of the register of deeds of Hertford County? Answer: "Yes."

2. If he made and delivered to J. C. Newsome such deed, did the said J. C. Newsome on 21 March, 1908, procure said R. E. Cowan to destroy the said deed, and to make and deliver to Dora M. Newsome a deed for the same land, of record in Book 32, page 415, in the office of the register of deeds of Hertford County? Answer: "Yes."

3. If so, did the said J. C. Newsome procure the said R. E. Cowan to destroy the deed to J. C. Newsome and to execute the deed to Dora M. Newsome, as alleged, with the intent to hinder, delay and defraud the creditors of the said J. C. Newsome, including J. R. Garrett? Answer: "Yes."

4. Was the deed from R. E. Cowan to Dora M. Newsome, as alleged in the complaint, fraudulent and void as to creditors of J. C. Newsome, and as to the indebtedness of J. C. Newsome evidenced by the note for $731.67, now held by the Bank of Ahoskie? Answer: "No."

5. Were the notes held by the Bank of Ahoskie as collateral made payable to Dora M. Newsome with intent on the part of J. C. Newsome to hinder, delay and defraud his creditors? Answer: "Yes."

6. Is the Bank of Ahoskie the owner of the note given by J. C. Newsome to J. R. Garrett, as alleged in the complaint? Answer: "Yes."

7. Is J. C. Newsome indebted to the Bank of Ahoskie, as alleged in the complaint; and if so, in what sum? Answer: "$731.67."

8. What amount did J. C. Newsome owe the Bank of Ahoskie at the time of the execution of his note for $1,100, given 15 September, 1911? Answer: "$1,100," by consent.

9. When was the J. R. Garrett note assigned to the Bank of Ahoskie? Answer: "18 January, 1912."

10. Was said assignment absolute, *bona fide*, and for a valuable consideration? Answer: "Yes."

11. Were the collateral notes described in the complaint deposited with and received by the Bank of Ahoskie as the property of Dora M. Newsome? Answer: "No."

12. Was the note executed by J. C. Newsome, payable to A. C. Vann, barred by the statute of limitations at the time of the execution of the deed from Cowan to Dora M. Newsome? Answer: "Yes."

13. Was the note executed by L. M. Outlaw and J. C. Newsome to J. W. Godwin barred by the statute of limitations as to J. C. Newsome at the time this action was begun? Answer: "No."

14. Was it so barred at the time the amendment was made in this action, towit, 18 July, 1914? Answer: "No."

15. Was the consideration for the collateral notes described in the complaint the purchase price of part of the land conveyed to Dora M. Newsome by Cowan? Answer: "Yes, in part."

Upon the findings of the jury, the court rendered judgment:

"That the defendant Bank of Ahoskie recover of the plaintiff J. C. Newsome the sum of $731.67, with interest thereon from 16 January, 1912, and the costs of this action, to be taxed by the clerk of this court.

"It is further ordered, considered and decreed that J. C. Vann and Stanly Winborne, receivers, out of the funds in their hands, being the balance of the proceeds of the said collateral notes, pay to the Bank of Ahoskie the sum of $731.67, with interest from 16 January, 1912, until paid, and the cost of this action, and that the said Bank of Ahoskie, upon the receipt of said sum, shall cancel the judgment herein rendered, if said amount is sufficient to pay the same in full, and if not, shall credit the said judgment with the amount of said payment; that if there be any surplus after paying said judgment, the said receivers shall pay the same to J. C. Newsome and Dora M. Newsome."

The plaintiffs appealed.

Winborne & Winborne, Pruden & Pruden, W. W. Rogers, E. T. Snipes, S. Brown Shepherd for the plaintiffs.

J. E. Vann, Winston & Matthews for the defendant.

BROWN, J. This case was before the Court at Spring Term, 1914, 165 N. C., 92, which is referred to for a statement of the cause of action. The Superior Court rendered judgment upon the pleadings in behalf of the plaintiff, but this Court was of opinion that issues were raised by the pleadings to be submitted to the jury.

The undisputed facts, as presented by the present appeal, are that J. C. Newsome executed to the defendant bank his note for $1,100, and deposited therewith as collateral certain notes given by T. B. Hall, $765; Norman Hall, $600, and Hoard Newsome, $700, all payable to Dora M. Newsome. These notes were deposited by J. C. Newsome, by and with the consent of his wife, Dora, as collateral security for the said $1,100. The paper-writing executed at the time by J. C. Newsome contains the following clause:

"The said bank is hereby authorized and empowered by the undersigned, upon the nonperformance of any of the promises or agreements herein contained, to appropriate to the payment and extinguishment of this note or of any other liability of the undersigned to said bank, whether now existing or hereafter arising, any and all property or

moneys of the undersigned in the possession of said bank, on deposit or otherwise, whether this note or said other liability be then due or not due. If said collaterals or any of them be exchanged for others, such others shall be held by said bank on the terms above set forth. The undersigned hereby waive the benefit of homestead exemption as to this debt and contract."

It appears that on 16 January, 1912, J. C. Newsome executed his note to J. R. Garrett for $731.67. This note, remaining unpaid, Garrett assigned the same to one Harmon, who refused to take it unless he could sell the same to the defendant bank, of which Garrett is a director.

The character of the transaction is disclosed by the following paperwriting:

Bank of Ahoskie having this day purchased of A. R. Harmon a note given to me, J. R. Garrett, the undersigned, by J. C. Newsome, for the sum of seven hundred thirty-one and 67-100 dollars ($731.67), dated 16 January, 1912, and by me (J. R. Garrett, the undersigned) indorsed to the said Harmon, and the said bank having to purchase the said note without some guarantee of its payment when due, and said Harmon having refused to accept said note from me (J. R. Garrett, the undersigned) unless he could sell same to said bank: Now, therefore, I do hereby guarantee to said Bank of Ahoskie the payment of the said note when due, together with all expenses, interest, and attorneys' fees said bank may be put to in the collection of said note: *Provided,* the said bank shall have all collateral they now have in hand belonging to the said Newsome until said bank is forced to give them up by law, or until satisfactorily settled and have first exhausted all legal remedy against said Newsome to enforce collection of said note before first calling on me therefor.

This 17 January, 1912. J. R. GARRETT. [SEAL]

The bank now claims under the above recited clause in the paperwriting, signed by Newsome, the right to retain the Garrett note out of the proceeds of the collateral deposited by Newsome. This collateral, by an agreement, has been put in the hands of receivers, to be collected by them, and it is admitted in the record in this case that the note for $1,100 has been fully paid.

We think that the exact question has been determined by this Court in *Bank v. Furniture Co., ante,* 180. In that case the bank undertook to retain out of collateral deposited by the Murphy Furniture Manufacturing Company other notes or evidences of debt which the bank had purchased against the said company, not embraced by the collateral contract. In rendering the judgment of this Court, *Justice Hoke* said:

"Applying these principles, we concur in his Honor's view that plain-

tiffs are not entitled to recover of the individual defendants. The evident purpose of these parties is to strengthen the credit of their company in its dealings with the bank, to the extent of the amount stipulated, and to save themselves the necessity and inconvenience of indorsing specifically every indebtedness which said bank might hold against the company, and from a consideration of this purpose and the language of the instrument and the facts in evidence, we think it clear that it was the intent of these parties, as expressed in the contract, to confine the obligation of the individual defendants to indebtedness arising out of transactions directly between the bank and their company, and that it did not and was not intended to include any and every indebtedness which the bank might acquire from third parties."

There is another principle involved in this case, not discussed in the above case. It is admitted that Garrett was a director in the bank. He is affected with knowledge of its transactions, and it is a fair inference, in fact, an almost irresistible conclusion, that when he assigned the note to Harmon, it was his purpose that Harmon should transfer it to the bank and that the bank should retain it out of the proceeds of the collateral which it held for the $1,100 note.

The bank held that collateral in trust to secure the note which Newsome had made to itself and whatever proceeds remained after the payment of that note, the bank held in trust for Newsome and his wife. It would be a gross breach of that trust to permit the bank officers to divert the proceeds of the collateral from the legitimate purposes expressed in the instrument in order to save a debt for one of the directors. Such transactions are against a wholesome and sound public policy.

The defendant seeks to "mend its lick" by asking the Court to permit the following amendment to the answer: "And that the said J. C. Newsome was also indebted unto A. C. Vann in the sum of $50 on a note, with interest, and unto J. W. Godwin in the sum of $20 on a note, with interest, and that he procured said deed to be made to his wife for the purpose of hindering, delaying, and defrauding them and his other creditors in the collection of these debts, all as above alleged."

By this amendment the defendant seeks to convert the action into a creditors' bill for the purpose of subjecting the proceeds of this collateral to the payment of other indebtedness of Newsome upon the ground of fraud. This will not avail the defendant, for the law will not allow a trustee to plead the outstanding indebtedness of the *cestui que trust* for the purpose of collecting the trustee's own debt. It is admitted in the record, not only that the note for $1,100, mentioned in the pleadings, has been fully paid, but that all the judgments set out in the answer, as existing against J. C. Newsome, have been paid.

The jury have found that the Vann debt is barred by the statute of limitations and neither Vann nor Godwin, who is said to hold a $20

note, have seen fit to file their petition in this proceeding and make themselves parties to it. They ask no relief against Newsome, and it does not lie in the mouth of this defendant, who held this fund in trust, to ask it for them. To show that they are not parties to this action and ask no relief in it, no judgment is rendered in their behalf, and their names are not even mentioned in the decree of the court.

If the bank seeks to subject the proceeds of this collateral deposited by the plaintiffs with them as security for the $1,100 debt, it has the right to institute a proceeding for that purpose; but it must first surrender all the plaintiff's collateral or the proceeds thereof which it holds in trust for them.

The purposes of the trust having been fulfilled and the debt paid, the bank has no right to divert the said trust fund to the payment of the Garrett note, simply because it alleges that Mrs. Newsome acquired the collateral by fraud. The bank must return to Mrs. Newsome the collateral which it wrongfully retained before it can proceed against her upon any such grounds. It will not be allowed to take advantage of its position to divert the trust fund to another purpose entirely foreign to the agreement.

For the reasons given, we are of the opinion that the court below erred in rendering judgment set out in the record. The defendant is entitled to a personal judgment against the plaintiff J. C. Newsome for $731.67 and interest. The plaintiffs are entitled to a decree (inasmuch as it is admitted that the $1,100 note has been paid) directing the receivers to pay over to the plaintiffs the proceeds of the collateral collected for them.

It does not appear whether Newsome, himself, paid the $1,100 note, or whether the receivers paid it out of that collateral. If the receivers paid it, they would be entitled to credit for it; if Newsome paid it, then the receivers must account for the entire proceeds, less the cost of collecting.

The cause is remanded to the Superior Court of Hertford County with instructions to enter judgment in accordance with this opinion.

Error.

W. E. PERRY v. H. G. KIME.

(Filed 6 October, 1915.)

Damages—Crops—Breach of Contract—Trials—Insufficient Evidence—Speculative Damages.

In an action to recover damages to a crop for the alleged failure of the defendant to furnish a mule for the purpose under his agreement to do so, evidence of such damages which merely compares the yield of that year with what the plaintiff had previously made with a mule is too speculative and uncertain to be submitted to the jury upon the issue.

WALKER, J., concurs in the result.

APPEAL by defendant from *Bond, J.*, at the June Special Term, 1915, of CHATHAM.

This is an action to recover damages, the plaintiff alleging two causes of action, the first being for a breach of warranty in the sale of a mule, and the second being for breach of contract in failing to furnish the plaintiff with a mule with which to cultivate his crop.

The damages sought to be recovered under the second cause of action was a diminished yield of the crop.

The plaintiff offered evidence tending to support both causes of action, and the defendant offered evidence to the contrary.

The plaintiff testified, among other things, that: "As a result of failing to get a mule to cultivate his 1914 crop, he was not able to cultivate his crops, and that his crops suffered for the reason he could not cultivate the same. That he owned no lands at that time and was not able to buy other stock at that time, for the reason defendant had his crops and other property under mortgage for the mule which he took back and afterwards refused to furnish one in its place; that he relied on defendant's word to furnish a mule to cultivate his 1914 crop.

He was asked how much cotton he made last year.

Plaintiff replied: "Two bales." Defendant excepted.

Plaintiff was then asked how much more he would have made if he had had a good mule. And he replied that he generally made seven to eight bales of cotton and close to seventy-five barrels of corn, and that last year he did not make but twenty-five barrels of corn and something over two bales of cotton. Defendant excepted.

The jury returned the following verdict:

1. Did the defendant guarantee and warrant that the mule would work any and everywhere, all right, as alleged in the complaint? Answer: "Yes."

2. Was said guarantee and warranty false, as alleged in the complaint? Answer: "Yes."

3. What damage, if any, is the plaintiff Perry entitled to recover? Answer: "Two hundred and fifty dollars, with interest from date of mortgage."

4. Did defendant Kime satisfy and discharge all claims plaintiff Perry had against him? Answer: "No."

5. Did defendant Kime agree to furnish a mule to plaintiff Perry to cultivate his crop with, and fail to do so, and thereby cause damage to plaintiff? Answer: "Yes."

6. If so, what damage, if any, did the plaintiff sustain by reason of such failure on part of defendant? Answer: "Twenty-five dollars."

Judgment was entered upon the verdict in favor of the plaintiff, and the defendant excepted and appealed.

A. C. Ray and Long & Long for plaintiff.

R. H. Hayes and F. W. Bynum for defendant.

ALLEN, J. The right to recover damages for diminution in the yield of crops alleged to have been caused by breach of contract or by some tortious act has been recognized in several cases in our reports (*Spencer v. Hamilton,* 113 N. C., 49; *Herring v. Armwood,* 130 N. C., 177), but always with misgivings, because of the difficulty of ascertaining definitely the cause of the damage, and on account of the uncertainty, frequently amounting to speculation, of determining and estimating the result.

We have been confronted on one hand with the legal principle that, when there is a breach of contract or a tort, and damage ensues as the direct and natural result, the party injured is entitled to just compensation, and that the uncertainty as to amount is not more doubtful than in other cases in which recoveries are sustained here and elsewhere, such as profits in business under certain conditions and physical pain and mental anguish, and on the other, with the knowledge that so many and such diverse circumstances affect the yield of crops that it is almost impossible to find out the cause or to estimate the result.

The character of the soil and its condition; the kind of seed used, when planted and how; the preparation of the soil for planting; the quality of fertilizer, the quantity and the time and manner of its application; the cultivation of the crop; the harvesting of the crop; the seasons, and other circumstances enter into the estimate of what ought to be made, and when all are favorable it is rare that the owner of land gathers in the fall what he expected in the spring.

A delay of a week in planting may make or destroy the crop, and sometimes, under apparently similar conditions, there is a good crop on one side of the road and a poor yield on the other side.

These considerations have led to the conclusion that a recovery of damages on account of the diminished yield of the crop will not be allowed upon a mere comparison of the crop yield of one year with that of another (*Tomlinson v. Morgan,* 166 N. C., 560), and that is the case presented by the plaintiff.

He says he generally made seven or eight bales of cotton and seventy-five barrels of corn, and that in 1914 he made two bales of cotton and twenty-five barrels of corn, but he fails to state how the land was prepared, how it was cultivated, what was the rainfall, or to give any circumstance which would justify the jury in awarding damages upon his second cause of action.

There must, therefore, be a new trial upon the fifth and sixth issues.

We have carefully examined the exceptions relating to the first cause of action, and find no error.

Partial new trial.

WALKER, J., concurs in result.

J. M. HARRISON v. A. T. DILL AND J. E. FISHER.

(Filed 6 October, 1915.)

1. Appeal and Error—Assignments of Error—Exceptions.

Assignments of error must rest upon exceptions taken at the time they are due in the orderly course of procedure, and should coincide with and not be more extensive than the exception itself; and no assignment of error will be considered on appeal unless founded upon an exception duly entered.

2. Judgments—Motions to Vacate—Findings—Appeal and Error.

The findings of fact of the trial judge, upon motion made to vacate a judgment, are conclusive on appeal when there is any evidence to support them.

3. Judgments by Consent—Motions to Vacate—Findings—Judgments Vacated.

A consent judgment entered in an action rests upon agreement made between two of the parties, which is authorized by the court, and when upon motion to vacate the judgment made in the lower court it appears from the facts found by the judge that the movant had filed an answer in due form denying the material allegations of the complaint, and a judgment has been entered purporting to be a consent judgment, but in fact without the consent of the movant, or his attorney of record, and that he had a good and meritorious defense, the judgment will be vacated.

4. Same—Two Defendants—Consent of One.

Where it appears that a judgment against two defendants, purporting to have been entered by consent, was not in fact consented to by one of them, and that it was proper to have set it aside as to him, it is not error for the trial judge to refuse to vacate the entire judgment as to both defendants, when it therein appears that the subject-matter is not the same and that the plaintiff withdrew his suit as to the other defendant.

APPEAL by plaintiff from *Peebles, J.*, at the September Term, 1914, of CRAVEN.

This is a motion to set aside a judgment against J. H. Fisher alone, purporting to have been rendered at the September Term of said court, 1913, by consent. The court finds the following facts:

1. The original action was brought to recover back $325 which plaintiff alleged he had paid A. T. Dill for some bank stock which turned out to be worthless, and that he was induced to buy said stock by the false and fraudulent representations of said Dill, backed up by the false and fraudulent representations of defendant Fisher.

2. That plaintiff was represented by McIver & Nixon, Dill by Guion & Guion, and Fisher by R. O'Hara, who filed for Fisher an answer denying each and every material allegation in the complaint, and the action was continued from term to term until the September Term, 1913.

3. That prior to September Term, 1913, Fisher and plaintiff agreed to compromise and settle the case on terms set out in defendant Fisher's petition (to set aside the judgment), and Fisher executed and delivered to plaintiff a bond in the sum of $150 to secure the performance of his part of said agreement. This finding is based upon the verified petition of defendant Fisher not controverted.

4. That the plaintiff did not comply with his part of said agreement.

5. That said action was calendared for the September Term of said court, but was not reached and tried in its regular order. During the term aforesaid plaintiff's counsel showed O'Hara a consent judgment, which was not signed, and O'Hara refused to agree to it, and later the judgment set out in the record was prepared and signed by consent of the plaintiff's counsel and counsel for defendant Dill, but was never submitted to defendant's counsel, O'Hara. It was never submitted to defendant Fisher, and he never knew anything of it until the sheriff came to him with an execution issued on said judgment. That neither O'Hara nor the defendant Fisher assented to said judgment. It would be hard to believe that O'Hara or Fisher would, with a full knowledge of its contents, consent to a judgment that let go free A. T. Dill, the chief sinner, according to the allegations of the complaint, and who got the $325, and make defendant Fisher pay $325 and costs, when he had received no part thereof. I find that Fisher has, *prima facie,* a good defense to the action.

Upon the foregoing facts found by me, it is considered and adjudged that said judgment, as to defendant J. H. Fisher, be and the same is hereby set aside and vacated, and the action as to Fisher be replaced on the trial docket. It is considered and adjudged that defendant J. H. Fisher recover of the plaintiff the costs of this motion.

R. B. PEEBLES,
Judge Presiding.

The court announced that the former judgment signed by *H. W. Whedbee, judge,* was set aside, in so far as John H. Fisher was concerned, and plaintiff then moved that if only part of the judgment was set aside, it should be vacated as a whole. This the court refused to do, and the plaintiff excepted. The judgment of the court was then signed and filed, and the plaintiff again excepted.

R. B. Nixon and W. D. McIver for plaintiff.
A. D. Ward for defendant.

WALKER, J., after stating the case: The plaintiff has assigned eleven errors, as having been committed by the court in respect to its order setting aside the former judgment of the court, whereas only two exceptions were entered to the order of *Judge Peebles* at the time it was made. The object of an assignment of error is not to create a new exception, which was not taken at the hearing, but to select from those which were taken such as the appellant then relies on after he has given more deliberate consideration to them than may have been possible during the progress of the trial or hearing. The assignment of error, therefore, must be based upon the exception duly taken at the time it was due in the orderly course of procedure, and should coincide with, and not be more extensive than the exception itself. In other words, no assignment of error will be entertained which has not for its basis an exception taken in apt time. *Worley v. Logging Co.*, 157 N. C., 490; *Bank v. McArthur*, 168 N. C., 48. But waiving this serious objection to several assignments of error, we will state generally that they are predicated upon the ground that *Judge Peebles* had found facts contrary to the weight of the evidence, or that he had failed to find facts according to the testimony of certain witnesses for the plaintiff. We could not sustain these assignments of error, if they had been properly framed upon exceptions duly taken, for the reason that we do not pass upon the weight of the testimony or its sufficiency to prove facts, but in motions of this kind we are concluded by the findings of the judge, if there was any evidence to support them, and in this case we think that the findings were amply supported by the testimony. We might go further and say, if we could examine the testimony, that the findings are sustained by the greater weight of the testimony. It appears therefrom that the consent of J. H. Fisher was not given, and that neither he nor his attorney had any notice thereof. It further appears that Fisher had filed an answer to the complaint, denying all the material allegations thereof, and especially all the charges of fraud in connection with the sale of the stock, and the court could not, therefore, render a judgment by default final, or even by default and inquiry, if it had been such, nor could he take any action which resulted in a final judgment without the con-

sent of J. H. Fisher, so far as he was affected thereby. The court having found that he did not consent to the judgment, it should, therefore, have been set aside, upon the ground of irregularity, as being contrary to the course and practice of the court, as there was a material issue raised by the answer. A judgment or decree entered by consent is not the judgment or decree of the court, so much as the judgment or decree of the parties, entered upon its records with the sanction and permission of the court, and being the judgment of the parties, it cannot be set aside or altered without their consent. *Edney v. Edney,* 81 N. C., 1; *Lynch v. Loftin,* 153 N. C., 270; *Justice Manning* says in the case last cited: "In *Vaughan v. Gooch,* 92 N. C., 524, *Smith, C. J.,* speaking for this Court to the effect and validity of a consent judgment, said: 'The judgment, or, as it is termed, the decree, is by consent, and the act of the parties rather than of the court, and it can only be modified or changed by the same concurring agencies that first gave it form, and whatever has been legitimately and in good faith done in carrying out its provisions must remain undisturbed. The authorities to this effect are simple and decisive among our own adjudications.' In *Wilcox v. Wilcox* (36 N. C.), 1 Ired. Eq., 36, *Gaston, J.,* declares a decree rendered by consent to be in truth the decree of the parties, and in such a decree, *stat pro ratione, voluntas,* that is, their will is a sufficient reason for it. In *Edney v. Edney,* 81 N. C., 1, *Dillard, J.,* says that 'a decree by consent, as such, must stand and operate as an entirety, or be vacated altogether, unless the parties by a like consent shall agree upon and incorporate into it an alteration or modification. If a clause be stricken out,' he adds, 'against the will of a party, then it is no longer a consent decree, nor is it a decree of the court, for the court never made it.' Such being the law in this State, the consent judgment was properly avoided as having beeen rendered without the consent of one of the parties thereto." The Court said, in *Bunn v. Braswell,* 139 N. C., 135: "The judgment of Spring Term, 1889, being by consent, is to be construed as any other contract of the parties. It constitutes the agreement of the parties made a matter of record by the court at their request." And *Judge Gaston* further said, in *Wilcox v. Wilcox, supra,* that a consent judgment is nothing more than a decree of the parties which is entered of record at their request and with the permission of the court.

But in order to bind a party by an alleged consent judgment, it must necessarily appear that his consent thereto was given, and if the contrary appears, it is, of course, not a consent judgment, and then the question arises, if the judgment was in any other way authorized by the law. Where an answer is filed denying the allegations of the complaint, the defendant is entitled to a trial by a jury, unless it is waived in the manner prescribed by law, or unless he gives his consent that judgment may

be entered notwithstanding his answer, and if the court renders judgment upon a complaint, the allegations of which are denied, and without the consent of the party, or a trial by the jury, the judgment will be irregular, and the court will set it aside on motion. So that in this case the order of the court was correct, unless there is merit in the other exception taken by the plaintiff, which is, that the court should set aside the entire judgment. It did set aside the judgment, in its entirety, so far as it affected Fisher, but we understand the plaintiff to content that the court should have set aside the judgment as to A. T. Dill, the other defendant. When we examined the judgment itself, which was entered at the September Term, 1913, by *Judge Whedbee*, we find that the judgment, as to Dill, apparently had no connection with that part of the judgment against Fisher. It recites that Harrison and Fisher had come to an agreement as between themselves in regard to the controversy, and then it is stated that J. M. Harrison, the plaintiff, withdraws his suit as against the said A. T. Dill, and admits his inability to sustain his allegations as to him. This was clearly a nonsuit or *retraxit* as to Dill, leaving the suit as pending between Harrison and Fisher alone, and a compromise or consent judgment is then entered as between them and without regard to any liability of A. T. Dill. So that the court in this case has complied with the rule that a decree by consent must stand and operate as an entirety or be vacated altogether, unless the parties by like consent shall agree upon and incorporate into it some alteration or modification, or some new term. "If a clause be stricken out against the will of the party, then it is no longer a consent decree, nor is it a decree of the court, for the court never made it." *Edney v. Edney, supra; Stump v. Long*, 84 N. C., 616; *McEachern v. Kerchner*, 90 N. C., 179; *Simmons v. McCullin*, 163 N. C., 409. The court, therefore, having found the fact in regard to the consent against the plaintiff, there was nothing to do but to set aside the judgment, as the answer denied the allegations of the complaint and set up a meritorious defense, all of which was duly verified. There was no error in the order and judgment of the court.

Affirmed.

J. W. HALFORD v. D. H. SENTER ET ALS., CONSTITUTING THE BOARD OF COMMISSIONERS OF HARNETT COUNTY.

(Filed 6 October, 1915.)

Health — County Commissioners — County Superintendent — Fixing Salary — Mandamus—Constitutional Law—Statutes.

Section 9, chapter 62, Public Laws of 1911, providing for a county board of health, by express provision requires the approval of expenditures made by them by the county commissioners, the latter, by constitutional

provision, being given, among other things, general supervision of the levying of taxes and the finances of the county; and where the county commissioners have disapproved of the amount of salary the county board of health has agreed to pay the county superintendent of health and fixed a less sum therefor, a mandamus will not lie to compel the payment of a greater sum than that so determined upon.

APPEAL by defendants from *Bond, J.*, at the May Term, 1915, of HARNETT.

Mandamus to compel defendants to audit and pay the plaintiff $600, salary as superintendent of health for Harnett County for one year. Upon the return of the writ it was made absolute, and defendants appealed.

Baggett & Baggett for the plaintiff.
E. F. Young for the defendants.

BROWN, J. The agreed facts are that plaintiff was duly elected superintendent of health for Harnett County by the board of health of said county and his compensation fixed by said board at the rate of $600 per annum. Upon the presentation of plaintiff's claim, the matter being properly brought before the defendants, the board of commissioners of said county, they declined to audit and allow such expenditure, upon the ground that it was exorbitant and unreasonable.

The defendants then authorized an expenditure of $300 per annum for the services of plaintiff as superintendent of health.

Section 9 of chapter 62 of the Public Laws of 1911 provides that the board of health shall make such rules and regulations, pay such fees and salaries and impose such penalties as in their judgment may be necessary to protect and advance the public health: *Provided,* that all expenditures shall be approved by the board of county commissioners before being paid.

The very question presented here was decided by this Court adversely to plaintiff's contention in *McCullers v. Commissioners,* 158 N. C., 84, where it is said: "It thus becomes the duty of the board of commissioners to pass on and audit the plaintiff's account for services and determine whether they are reasonable and within the bounds fixed by the statute. . . . The approval of the defendant's board is necessary to the payment of plaintiff's account, and while the courts will not undertake to compel the county commissioners to approve them, they will require them to consider the account and to pass on it in good faith in the exercise of a sound judgment as to whether or not the services as charged are warranted by the statute."

The Constitution of this State prescribes that a board of commissioners shall be biennially elected in each county. Such board is given "a general supervision and control of the penal and charitable institutions,

schools, roads, bridges, levying of taxes and of the finances of the county as may be prescribed by law."

The commissioners constitute the local governing body of the county and are directly responsible to the people who elected them. It is not only reasonable but due to the people of the county that these men elected by them should have supervision and control over the expenditures of a subordinate and nonelective board.

It is not to be supposed that the General Assembly intended to deprive the taxpayers of a county of such necessary and proper protection and safeguards which are thus thrown around the county treasury.

The proceeding is dismissed at cost of plaintiff.

Reversed.

BOARD OF SUPERVISORS PUBLIC ROADS OF PACTOLUS TOWNSHIP v. BOARD OF COMMISSIONERS OF PITT COUNTY.

(Filed 6 October, 1915.)

1. Roads and Highways—County Commissioners—Discretionary Powers—Constitutional Law.

The county commissioners are charged with the duty of establishing roads in the county and maintaining them, and are authorized to pay therefor out of the county treasury; and when this is done by them in the exercise of their discretion, without fraud and malversation, the courts may not interfere.

2. Same—Evidence—Dedication—Pleadings.

Where township supervisors of roads seek to enjoin the county commissioners from work on a road on the ground that the road was not a public road, and it is alleged in the answer of the county commissioners that the road is a public road, which is confirmed by the owner of the land over which it runs, the effect is that of a dedication and acceptance, and the injunctive relief sought should be denied.

3. Roads and Highways — County Commissioners — Discretionary Powers—Township Supervisors—Constitutional Law—Statutes.

Where by special legislative enactment the commissioners of a county are authorized to levy a special road tax upon the property of each township annually, and apply funds so collected from each township exclusively to road improvements therein, the discretionary power vested in the commissioners, under the Constitution, as to working any particular road, or which roads in the township shall be worked, etc., is not interfered with; and the powers of the township supervisors of roads, created by special statute, are, in this respect, subject to that of the county commissioners.

APPEAL by defendants from *Bond, J.*, at August Term, 1915, of PITT.

Albion Dunn and Harry Skinner for plaintiffs.

S. J. Everett and Julius Brown for defendants.

CLARK, C. J. This action is brought by the board of supervisors of Pactolus Township in Pitt County against the board of commissioners and county treasurer of said county, to enjoin the county commissioners of Pitt from making any further improvements on the road leading from the bridge across Tar River at Boyd's Ferry, Pitt County, to the Pactolus and Washington road.

The plaintiffs allege that said road is a private road and not a public road, and seek to enjoin the board of county commissioners from ordering payment of bills for the improvement of said road and to restrain the county treasurer from paying such orders. The defendants deny that the road in controversy is a private road, and allege that it is a public road and that they are empowered to work the same under the general law, ch. 714, Laws 1905. This law makes it obligatory upon the county board of commissioners to have the roads of Pitt County worked and to pay for the same out of the township road fund of the respective townships in which the roads lie.

In *Davenport v. Commissioners,* 163 N. C., 147, this Court held that the bridge at Boyd's Ferry is a public ferry and that the road leading up to said ferry on the north and south sides of said river are public roads. Indeed, independent of that decision, the county commissioners, who are charged with the duty of establishing and working the roads of said county, state in their answer that said road is a public road, and the owner of the land over which it passes asserts the same. This would establish that it was a public road by dedication, even if there had not been the adjudication above cited. *Tise v. Whitaker,* 146 N. C., 376. Further, as was shown in the evidence in the former case of *Davenport v. Comrs.,* in colonial days, the royal post road between Williamsburg, Va., and Charleston, S. C., crossed the Tar River at Boyd's Ferry, which at that time was known as Salter's Ferry, afterwards as Watkins' Ferry, and later on as Boyd's Ferry. 7 Colonial Records, 149, 413, for 1766. In 5 Colonial Records, 1211, Rev. Mr. McAden, in his Journal for 2 April, 1756, mentions being at Salter's Ferry on Pamlico River.

In *Glenn v. Comrs.,* 139 N. C., 412, it was held that where a bridge had been constructed by a citizen at his own expense, who had opened up public roads leading to the bridge on both sides of the river and the commissioners accepted the bridge as a public bridge, this made the roads leading to it public highways.

It was further held in that case: "The order in which work upon the public highways is to be performed is within the sound discretion of the county commissioners, and when they have exercised this discretion honestly and in a manner which they conceive to be for the best interest of the county it excludes any interference by the courts." This case is cited with approval in *Davenport v. Comrs.,* in which it is said that, "In the absence of fraud or oppression, such matters are within the

sound discretion of the county commissioners and will not be reviewed by the courts."

The present case is exactly on all-fours with *Brodnax v. Groom*, 64 N. C., 244. In that case certain taxpayers sought an injunction against the county commissioners to prohibit their levying a tax to build a $10,000 bridge at a point which said plaintiffs contended was an inconvenient and unsuitable place, where the bridge would not be connected with any public road, and that it was entirely too costly and a waste of public funds. This Court held that this was a matter for the administrative department of the Government which under our system of local self-government was vested in the county commissioners, who were elected by the people of the county, and amenable to their control; and that the courts had no right to intervene and supervise the exercise of such powers; and that in the absence of fraud or oppression the courts could not intervene. *Chief Justice Pearson* used these words, which this Court has often quoted and which should always be borne in mind: "In short, this Court is not capable of controlling *the exercise* of power on the part of the General Assembly, or of the county authorities, and it cannot assume to do so without putting itself in antagonism as well to the General Assembly as to the county authorities and *erecting a despotism of five men*, which is opposed to the fundamental principles of our Government and the usages of all times past."

He further said: "For the exercise of powers conferred by the Constitution the people must rely upon the honesty of the members of the General Assembly and of the persons elected to fill places of trust in the several counties. This Court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the Constitution upon the legislative authority of the Government or upon the county authorities."

Under the Constitution and the statute the county commissioners are vested with the control of the county roads of said county. It is true that by virtue of ch. 714, Laws 1905, the commissioners of Pitt are authorized to levy a special road tax upon the property of each township annually, and that the funds so collected in each township shall be set apart to be used solely for the improvement of the roads in the townships where it is collected. But whether one particular road or another or what roads in said township shall be worked is a matter which rests in the county commissioners. The powers of the township supervisors of the roads in this respect are subject to that of the county commissioners.

If these defendants were proceeding to embezzle the fund, or fraudulently misappropriate it, they would be liable to indictment, and in a proper case an injunction would lie to restrain the misuse of such fund. The findings of fact upon an injunction are subject to review on appeal,

and we find nothing in this evidence which justifies an injunction upon the ground of fraud or misappropriation of funds by the county commissioners. It may or may not be that the county commissioners are using the very best judgment in selecting the roads to be worked in Pactolus Township. The road supervisors of the township certainly disagree with them as to that; but as has been said in *Brodnax v. Groom, supra,* and many other cases, we are not authorized to supervise such matters. The greatest and most infallible of all judges disclaimed jurisdiction in a matter not committed to him. In the language of Scripture, "Who made us judges over such matters?" Luke XII, v. 14. In this case, as Virgil puts it, *"Non nostrum tantas componere lites."*

However gratifying it may be to the judiciary to be deemed competent by reason of their supposed superior wisdom to decide and settle controversies over local differences of opinion in administering the affairs of a county, the judiciary have no special qualifications which make them better fitted than their fellow citizens who have been chosen by the people to administer such matters. These are purely administrative matters about which good men may differ, but the decision thereof rests with the local officials elected by and responsible to the electors of the locality. The courts can only interfere when there is such fraud or malversation as calls for an indictment, or such fraud or oppression is attempted as clearly requires that the further action of the administrative board shall be stayed to prevent the misappropriation of public funds. But the courts are not empowered to supervise the action of administrative boards because of a difference of opinion as to the action taken or contemplated by the officials charged with the duties of administration.

The restraining order should have been dissolved.

Reversed.

L. H. AND L. B. HIPP v. T. E. FARRELL.

(Filed 6 October, 1915.)

1. Negligence—Tort Feasors—Joinder—Parties—Demurrer.

The wrongful acts of two or more persons concurring in producing a single injury, with or without concert between them, may constitute joint tort feasors of the persons so acting, and they, as a rule, may be sued jointly or together, at the election of the plaintiff; and wherein the plaintiff, by proper allegation, has pursued the latter course, and a cause of action is stated against either of the defendants, a joint demurrer filed to the complaint is bad.

2. Public Officers—Judicial and Discretionary Powers—Corruption—Malice—Allegation—Proof.

Public officers are not personally liable to persons specially injured by their acts done in the exercise of judicial or discretionary powers con-

ferred on them by statute, unless it is alleged and shown that in doing the acts complained of they did so corruptly and with malice.

3. Roads and Highways—Commissioners—Ministerial Duties—Negligence—Individual Liability—Pleadings—Demurrer.

Public officers are held to an individual liability in the negligent performance of or negligent omission to perform a purely ministerial duty, to a person specially injured thereby, when the means to do so are available and when it does not involve the exercise of a discretionary or judicial power conferred upon them by statute; and the demurrer to the complaint in an action against the individual members of a highway commission, alleging injury to the plaintiff solely by a defective approach to a bridge over a stream on a public highway in their charge, with ample previous notice of the defect causing the injury, that it was under the official control of the defendants, and that they had available means for repairing the defect alleged, is bad, it not being required that the plaintiff allege or show the act complained of was done "corruptly or with malice."

4. Same—County Bridges—Judicial Notice.

In this action to recover damages of the individual members of a highway commission, alleged to be caused by its negligent failure to keep the approach to a stream in proper repair, as to whether the court will take judicial notice that the bridge is a county bridge, and under the care and control of the county commissioners, Revisal, sections 2696 and 29, *quære*. But the allegations of the complaint being sufficient that the bridge was under the sole care and control of the defendants, the question is not decided, and the demurrer is held to be bad.

APPEAL by defendants from *Bond, J.*, Spring Term, 1915, from LEE.

Civil action pending in Superior Court of Lee County, heard on demurrer and by consent of parties at Pittsboro, Chatham County, on 15 May, 1915. The actions were instituted against the defendants as individuals for an alleged breach of duty on their part as members of the highway commission of Lee County and R. P. Coble as superintendent of said county, holding their offices under ch. 586, Local Laws of 1911, for breach of duty on their part, in that, having means available for the purpose, they knowingly, negligently and carelessly failed to repair the wooden approaches to a certain bridge in Lee County, whereby plaintiff, in attempting to drive his team over said bridge, and by the falling in of the same, received severe injuries to his person and to his property. No. 141 having been instituted for recovery of damage done to the team and No. 142 for injuries to the person, the question of liability in each being dependent on the same state of facts and set forth in the complaint as follows: Sections 1 and 2 of the complaint allege the positions held by defendants under ch. 586, Public-Local Laws 1911, R. P. Coble as superintendent and the others as members of the highway commission. In sections 4 and 5 the facts relevant to the alleged liability are set forth as follows:

"4. That the defendants, in violation of the duties and obligations imposed upon them by law, knowingly, negligently and carelessly allowed

the approach on the Sanford side of the Lockville bridge in said Lee County to be and remain out of repair, unsafe, and in a condition dangerous to those using the bridge for a space of over fifty-two days prior to and including 17 November, 1914, during all of which said time the timbers and joists of said approach were in a rotten, weak and dangerous condition; that on 6 October, 1914, the defendants, while in a meeting assembled at Sanford, N. C., were duly and formally advised and notified by citizens of Lee County that the condition of the said bridge and approach was as hereinbefore set forth; that the defendants negligently and carelessly failed and omitted to have same repaired until after the date upon which the plaintiff sustained the damage and injuries hereinafter described, although defendants had during said times means and resources wherewith to repair and render safe the said bridge and approach. That the said Lockville bridge, spanning Deep River, and the approach thereto, is a part of the public road or highway in Lee County, known as the Raleigh and Fayetteville road, and as such was at said time under the exclusive care and control of defendants; that the approach to said bridge, upon the Sanford side of Deep River, was an elevated wooden gangway or bridge, which began about fifty feet from the bridge proper, and at its junction with the bridge was elevated about fifteen feet above the ground.

"5. That on or about 27 November, 1914, plaintiff, while lawfully using the highway above referred to, drove a wagon, upon which was loaded about a cord of oak wood, and drawn by two mules, on and upon the approach to Lockville bridge, upon the Sanford side thereof, with the intention of crossing; that the plaintiff was seen upon said wagon, driving in a careful and prudent manner; that just as the front feet of said mules reached the bridge proper, one of the joists or sleepers which supported said approach broke, and that part of said approach upon which said wagon was standing collapsed and the wagon upon which the plaintiff was riding fell a distance of fourteen and one-half feet to the ground, and the said mules were drawn backward with said wagon and fell through the opening, and one of said mules fell upon and across plaintiff, pinning him down so he could not free himself, whereby plaintiff was crushed, bruised and seriously and painfully hurt and injured about the legs, thighs and back, all of which was caused solely and entirely by the negligence of defendants in allowing said bridge and approach to be and remain out of repair and in an unsafe condition, as aforesaid."

Section 6 states the extent of the injury as claimed in the one case to the person of plaintiff and the other to the wagon and team.

The defendant, in apt time, filed a written demurrer to the complaint in terms as follows:

"The defendants demur to the complaint upon the following grounds:

"1. For that there is a defect of parties in that there is no community of interest amongst the said defendants with respect to the alleged cause of action.

"2. For that several causes of action have been improperly united in that there is no community of interest amongst the defendants with respect to the cause or causes of action set up in the complaint.

"3. For that the complaint does not state facts sufficient to constitute a cause of action in that the complaint does not state that the defendants in the various acts and omissions with which they are charged have acted other than negligently."

On the hearing the defendants, in addition, moved *ore tenus*, to dismiss the action as to R. P. Coble, for that no cause of action was stated against him. And also the other defendants so moved to dismiss the action as to them. The court overruled both the demurrer and the motions made, and defendants, having duly excepted, appealed.

Clarkson & Taliaferro for plaintiff, in both cases.
A. A. F. Seawell for defendants, in both cases.

HOKE, J., after stating the case: Authority here and elsewhere is to the effect that where the wrongful acts of two or more persons concur in producing a single injury, and with or without concert between them, they may be treated as joint tort feasors, and, as a rule, sued separately or together, at the election of the plaintiff. *Hough v. R. R.*, 144 N. C., 692; *Clark v. Guano Co.*, 38 Cyc., pp. 488 *et seq.* The only case with us which tends to impose any restriction on the position is that of *Guthrie v. Durham*, 168 N. C., p. 573, where, on a question of primary and secondary liability of joint tort feasors, it was held that, *on application* of the *defendants*, the person primarily liable should be made party, the policy and purpose of our present Code of Procedure requiring that every feature of a given controversy should be settled in one action as far as consistent with the orderly and efficient administration of justice. Again, it is held with us that, where two or more are sued as jointly responsible for a wrong, a joint demurrer filed will be held bad if a cause of action is stated against either of the defendants. *Caho v. R. R.*, 147 N. C., p. 20. It would seem, therefore, that the first and second grounds, as stated in the written demurrer, cannot be sustained.

Recurring, then, to the third position of the written demurrer, and as presented by the motion to dismiss, *ore tenus*, it is recognized in this State, supported, we think, by the weight of well considered authority in other jurisdictions, that one who holds a public office, administrative in character, and in reference to an act clearly ministerial, may

be held individually liable, in a civil action, to one who has received special injuries in consequence of his failure to perform or negligence in the performance of his official duty, and it is very generally held that a failure to keep in repair the public highway or bridges, when the duty is plain and the means for the purpose available, should be construed as a breach of a ministerial duty, rendering the offender liable within the meaning of the principle. *Hathaway v. Hinton,* 46 N. C., 243; *Hoover v. Barkoof,* 44 N. Y., 113; *Robertson v. Chamberlain,* 34 N. Y., 389; *Doeg v. Cook,* 126 Cal., p. 213; *Adsit v. Brady,* 4 N. Y. (Hill), p. 630; *Robinson v. Rohr,* 73 Wisconsin, 436; *Commissioners v. Blackburn,* 105 Md., 226; *Smith v. Zimmer,* 48 Montana, 332; Throop on Public Offices, sec. 737; 2 Elliott on Roads and Streets, sec. 858. The position referred to is all the more insistent with us for having held, in *White v. Commissioners,* 90 N. C., and other cases, that the county, as a municipality, cannot be held liable, unless expressly made so by statute. If the county officials, guilty of a breach of a plain ministerial duty, are not liable as individuals, the greatest wrong could be perpetrated and the citizen left without any adequate redress. The doctrine, as applied to the facts of this case, will be found very well stated and sustained in the California decision, as follows, *Henshaw, J.,* delivering the opinion:

"It is first insisted in support of the demurrer—and this may be said to be the principal question in the case—that the complaint states no cause of action, because an action will not lie against public officers such as these for injuries resulting from their mere negligent omission. It is well settled in this State that generally an action will not lie against a municipal corporation for the misfeasance, malfeasance, or nonfeasance of its officers. *Huffman v. San Joaquin Co.,* 21 Cal., 426; *Winbigler v. Los Angeles,* 45 Cal., 36; *Chope v. Eureka,* 78 Cal., 588, 12 Amer. St. Rep., 113; *Arnold v. San José,* 81 Cal., 618; and if the position of respondent is sound upon this contention, it must result that an injured party under circumstances such as these has no redress whatsoever."

Upon the question thus presented it must at once be conceded that there is a conflict in authority, but the very decided trend of modern decision is to hold such officers liable for acts of nonfeasance, or for the negligent performance of a duty when the duty is plain, when the means and ability to perform it are shown, and when its performance or nonperformance, or the manner of its performance, involves no question of discretion. In short, where the duty is plain and certain, if it be negligently performed, or not performed at all, the officer is liable at the suit of a private individual especially injured thereby. Shearman and Redfield on Negligence (3 Ed.), sec. 156, thus state the rule: "The

liability of a public officer to an individual for his negligent acts or omissions in the discharge of an official duty depends altogether upon the nature of the duty to whch the neglect is alleged. Where his duty is absolute, certain, and imperative, involving merely the execution of a set task—in other words, is simply ministerial—he is liable in damages to any one specially injured, either by his omitting to perform the task, or by performing it negligently or unskillfully. On the other hand, where his powers are discretionary, to be exerted or withheld according to his own judgment as to what is necessary or proper, he is not liable to any private person for neglect to exercise those powers, nor for the consequence of a lawful exercise of them where no corruption or malice can be imputed, and he keeps within the scope of his authority." In *Robinson v. Chamberlain*, 34 N. Y., 389, 90 Am. Dec., 713, the question is considered at length and many cases reviewed. It is there said: "In *Adsit v. Brady*, 4 Hill, 630, 40 Am. Dec., 305, the broad rule is laid down that 'when an individual sustains an injury by the malfeasance or nonfeasance of a public officer, who acts or omits to act contrary to duty, the law gives redress to the injured party by an action adapted to the nature of the case.' This is a helpful rule, sound entirely in public policy, if as a rule of law it can be questioned. As a rule of law, as there applied, it has stood for nearly a quarter of a century, and I think should continue." Without further quotation of authorities upon the question, it will be sufficient to refer to the instructive note to *County Commissioners v. Duckett*, 83 Am. Dec., 557, where the liability of road officials for negligence in repairing and maintaining public highways is elaborately considered, and to Wharton on Negligence, secs. 285, 286, and Elliott on Roads and Streets, 506.

It is otherwise in the case of judicial officers and also of administrative officers when engaged in official acts involving the exercise of judgment and discretion, in which case they are sometimes termed *quasi*-judicial. The principle governing in these cases is that they cannot be held responsible unless it is alleged and proved that they acted "corruptly or with malice," a position approved by the Court in the recent case of *Templeton v. Beard*, to which we were cited by defendant's counsel. In that case plaintiff sued the county commissioners of Rowan County as individuals, alleging that she had received great damage in attempting to cross at a dangerous ford in said county, the complaint being that the commissioners had negligently failed to have a bridge constructed at that place. It was held that the act involved the exercise of judgment and discretion, and no liability attached, unless the commissioners acted corruptly. Speaking to the position, the Court said: "Nor will the action lie against the members of the board as individuals, because there is no averment that defendants acted or failed to act "cor-

ruptly or of malice." The case presented is one involving the exercise of discretionary powers conferred upon the board for the public benefit, and it is very generally recognized in such case that in the absence of statutory provision even ministerial officers, acting on questions arising properly within their jurisdiction, are not liable to suit by individuals without an averment of that kind. In such cases these officers are sometimes termed "*quasi*-judicial," and the general principle applicable is stated by Mechem on Public Officers, as follows: "The same reasons of private interest and public policy which operate to render the judicial officer exempt from civil liability for his judicial acts within his jurisdiction apply to the *quasi*-judicial officer as well, and it is well settled that the *quasi*-judicial officer cannot be called upon to respond in damages to the private individual for the honest exercise of his judgment within his jurisdiction, however erroneous or misguided his judgment may be. The name applied to the office or the officer is immaterial. The question depends in each case upon the character of the act. If it be judicial or *quasi*-judicial in its nature, the officer acts judicially, and is exempt. Neither is it material that the officer usually or often acts ministerially. In those cases in which he does act judicially he is, nevertheless, exempt. A statement approved in numerous decisions here and elsewhere. *Hudson v. McArthur,* 152 N. C., 445; *Raysford v. Phelps,* 43 Mich., 342; *Baker v. State,* 27 Ind., 485; 28 Cyc., 466," and the same may be said of the case of *Shryer v. Commissioners of Greene,* 119 Ind., 444, also relied upon by the defendant. In that case a bridge had been practically destroyed and the county authorities were deliberating as to whether an abandonment of the bridge would not be best for the public interest and some other way of crossing the stream provided, and a mandamus to compel them to restore the bridge was refused. It involved an exercise of judgment, referred by law to the county commissioners.

A correct application of the principles approved and sustained by these authorities, in our opinion, gives full support to his Honor's decision overruling the demurrer and denying the motion to dismiss, made *ore tenus.* A complaint containing definite and specific allegations that the bridge and approach thereto were under the exclusive care and control of the defendant; that, having actual knowledge of conditions and with funds available for its repair, defendants had, for 52 days just preceding the injury, knowingly, negligently and carelessly permitted the wooden gangway to be and remain in a rotten, weak and dangerous condition, and that said gangway fell as plaintiff was endeavoring to drive his wagon and team across the bridge, causing a fall of 14½ feet, practically ruining the wagon and inflicting severe injuries on plaintiff personally, and to his mules. This, to our minds, and on

the facts as defendant admits them to be, by his demurrer and motion, shows, as the record now stands, a breach of official duty clearly ministerial and constituting an actionable wrong unless, by opposing testimony, the obligation to repair is removed or the charge of negligence in some way refuted.

It is urged for defendant that the court should take judicial notice of the fact that the bridge in question is a county-line bridge and, as such, under chapter 65, section 2696, and chapter 23, section 29, the same is under the care and control of the county commissioners of the county, and that no responsibility should attach to the defendants or either of them by reason of the bridge or the approach thereto.

While the Court, as a rule, will take judicial notice of the position of prominent water-courses of the country (*S. v. Ry.*, 141 N. C., p. 846; *Harper Furniture Co. v. Express Co.*, 144 N. C., p. 639), there is doubt if the principle can be extended to taking notice of the location of any particular bridge; but if this be conceded, we are of opinion that, on the record as it now stands, this position of defendants cannot be sustained. A perusal of the statute, chapter 586, and particularly of sections 9 and 10, will disclose that very large powers are conferred and extensive duties imposed upon the highway commissioners and highway superintendent as to both roads and bridges, and it may be the proper construction of the law that the entire matter is referred to these defendants. But, whether arising under the statute, and that we do not now decide, or by reason of some valid arrangement with the commissioners, or even because of the fact that the defendants had assumed and entered on the duty of maintaining this approach in proper condition, a case presented in *County Commissioners v. Blackburn*, 105 Md., *supra*, we are of opinion, and so hold, that, on specific and definite allegation, admitted by the demurrer, that this bridge and approach is a part of the public road of Lee County, and under the exclusive care and control of defendants, etc., etc., that defendants' duty to repair is sufficiently averred, and that in connection with the other facts the defendant has been properly required to answer over, and the judgment to that effect is

Affirmed.

WILKINS-RICKS COMPANY v. J. A. MCPHAIL.

(Filed 6 October, 1915.)

1. Transferance of Cause—Omissions in Transcript—Record Evidence—Affidavit—Orders.

Where a new county is created and causes of action are transferred thereto, and it appears that one of them was in claim and delivery, whereunder the defendant's property was seized and replevied, but the papers had not been transferred with the other papers, the judge may, without

affidavit of the plaintiff, make an order directing an amended or supplemental transcript to be sent, including the claim and delivery papers, when it appeared from the record that they were missing.

2. Judgment—Estoppel.

A judgment in an action by a landlord against his tenant and another to recover rent for the land, is not an estoppel in another action between the defendants, involving only the question of an account and settlement between them, exclusive of the question of rent.

3. Transferance of Cause—Papers Omitted—Evidence—Identification.

Where an order has been made by the court that an omission of claim and delivery papers in transferring a cause from another county be supplied, and thereafter a party to the cause introduces the papers upon the trial, evidence of the genuineness of the signature of the clerk of the Superior Court to whom the order was directed, indorsed thereon, and also that of the process officer who served the papers, is sufficient for identification.

4. Trials—Evidence—Books—Admissions.

Upon giving direct testimony of the indebtedness of the defendant, the amount being in controversy, it is competent for the plaintiff to introduce the ledger in corroboration and further testify that the defendant had seen the statement thereon and admitted it to be correct.

5. Evidence—Pleadings—Declaration in Interest—Collateral Matters.

In this action involving the amount in dispute by the parties, it is held that the introduction by the plaintiff of his amended complaint was not erroneous as a declaration by him in his own favor, as the court did not permit it as evidence of the amount due, and it did not prejudicially affect the question submitted.

APPEAL by defendant from *Daniels, J.*, at the January Special Term, 1914, of LEE.

Action to recover personal property which the plaintiff alleges it is entitled to possession of by reason of certain liens and chattel mortgages executed by the defendant. The defendant relies upon the plea of payment, and of an estoppel, arising out of the judgment in an action in which one Jeanson was plaintiff and the present plaintiffs and defendant were defendants.

The action was commenced in Moore County in 1905, and was transferred to Lee County in 1908. Papers in claim and delivery were issued in the action, and the property was seized thereunder and the defendant executed a bond as provided by statute and retained the property. When the action was transferred to Lee County the papers in the claim and delivery proceeding were not sent with the others papers, and were not a part of the transcript, and at July Term, 1913, of Lee Superior Court an order was made directing an amended or supplemental transcript to be sent, which was done, and which included the claim and delivery papers. The defendant excepted to this order upon the ground that it was not based upon an affidavit. The defendant, upon the trial, ten-

dered an issue involving the plea of estoppel, which was refused, and the defendant excepted. The defendant also excepted to the introduction of the claim and delivery papers upon the ground that they had not been properly indentified.

The plaintiff introduced the ledger containing the account against the defendant and the defendant excepted. The defendant introduced the original complaint, in which it was alleged that advances had been made to the defendant amounting to $74.61, and the plaintiff was permitted to introduce the amended complaint, in which it was alleged that the balance due the plaintiff was $74.61, and the defendant excepted. There was a verdict and judgment for the plaintiff, and the defendant appealed.

Williams & Williams and A. A. F. Seawell for plaintiff.
Hoyle & Hoyle for defendants.

ALLEN, J. It was not necessary that an affidavit should be filed as the basis of the order of July Term, 1913, as it appears from the order itself that an inspection of the record showed the absence of the papers in the action, and this gave the court the authority to supply them. The issue involving the plea of estoppel was properly refused. The estoppel is pleaded, but there was no evidence to support it.

Jeanson, the plaintiff in the former action, was the landlord, and the only question involved was her right to recover $60 rent, and the state of the accounts between the plaintiff and the defendant, which is the matter in controversy in this action, was not considered or determined. The evidence is ample to identify the claim and delivery papers, and to show that they were regularly issued in the action.

Mr. Campbell testified that he knew the handwriting of Mr. McDonald, who was the clerk of the Superior Court of Moore County; that the seal attached to the papers was the seal of the clerk of the Superior Court of Moore; that he knew the handwriting of the defendant J. A. McPhail and of A. F. McPhail, the surety on his replevy bond, and that the signatures on the bond were in the handwriting of these two persons; that the signature of McDonald, the clerk, on the back of the claim and delivery papers ordering a seizure of property was in his handwriting, and that he was clerk at the time the order purports to have been signed; that he also knew the signature of C. G. Petty, the officer who executed the order of seizure, and that the signature on the papers was in his handwriting.

There seems to be really no controversy as to the issuing of the claim and delivery papers regularly in the action, because the defendant testified: "I got a replevy bond for the wagons and other stuff for which the claim and delivery was served."

The ledger containing the account against the defendant, when considered in connection with the evidence of the plaintiff, was competent. The plaintiff testified that the defendant saw this account in the ledger and admitted it to be all right. The introduction of the amended complaint might be objectionable as a declaration of the plaintiff in his own interest, but it appears from the record that his Honor did not permit it to be introduced as evidence of the amount due.

It appears, also, from the evidence that the defendant admitted that he owed the plaintiff $14.31, and that the real dispute was whether he should be charged with $60 recovered against the plaintiff by the landlord of the defendant, this amount being for rent, and being recovered of the plaintiffs because they had received certain proceeds of the crops raised by the defendant.

Upon a consideration of the whole record we find

No error.

IN RE WILL OF ELI A. CRAVEN.

(Filed 6 October, 1915.)

1. Appeal and Error—Prejudicial Error—New Trial.

Error committed by the trial judge must be prejudicial to be reversible and to entitle the appellant to a new trial, for if he is not hurt by the ruling to which exception was taken, there is no reasonable ground of complaint.

2. Appeal and Error—Evidence Rejected—Harmless Error.

Where there is a will with two codicils, admittedly valid as to the will and first codicil, but the second codicil is sought to be set aside on the ground of fraud, declarations of the testator made some six or eight months before the date of the second codicil and previous to that of the first one, that the husband of the beneficiary was endeavoring to get the property therein devised to him, if the declarations were competent as evidence in the caveator's behalf, is not reversible error, under the facts of this case, it appearing that there was strong evidence that the mind of the testator had subsequently undergone a complete change towards the devisee, and that the evidence rejected, being merely cumulative, would not have affected the verdict.

3. Same—Admissions.

Upon the trial to set aside a will for mental incapacity and undue influence, it appeared that the will had two codicils, the latter of which only was sought to be declared invalid, and that the date of making the will and first codicil the testator was of sound mind, and was free from undue influence. The caveators offered a letter in evidence written by the beneficiary under the second codicil, bearing upon the mental condition of the testator, nearly three years before the second codicil was made and before the making of the first codicil. *Held*, the law presumes sanity when shown to exist until it appears to the contrary, and the rejection of the letter as evidence was immaterial or, at least, not prejudicial, sufficient mental capacity of the testator thereafter being shown with reference to the first codicil.

4. Evidence—Witnesses—Impeachment—Warning.

Where a witness testifies to matter it is proposed to impeach, by matter tending to show something collateral to the issue involved in the action, he should first be given proper warning before offering the impeaching testimony as to his bias, temper, or disposition towards the parties or the cause, by directing his attention to the impeaching evidence, so that he may have an opportunity to admit, deny or explain it.

5. Wills—Mental Capacity—Trials—Instructions.

The rule as to the mental capacity requisite for a testator to make a valid disposition of his property by will is sufficiently given when the court charges the jury that they must find that the testator knew at the time the nature and effect of his act, and that he was making a will disposing of his property and to whom, and the relationship of the beneficiaries to himself. The early and the more modern rule discussed by WALKER, J.

6. Trials—Instructions—Wills—Mental Capacity—Prayers for Instruction.

There is no special formula required for instructing the jury as to the mental capacity required for the valid execution of a deed or will, and a special instruction requested thereon, though correctly stating the law, will not confine the judge to the language therein used, for it is sufficient if the trial judge substantially gives it in his own words, he not being bound by the language of counsel.

7. Wills—Mental Capacity—Undue Influence—Evidence.

Mental weakness of the testator from old age, at the time of his making a will, or after his mind has lost a portion of its former vigor and has become weakened by age, disease or otherwise, compatible with sufficient mental capacity to execute a valid will, provided he understands all that he is about, and choses rationally between one disposition of his property and another, and is able to retain the facts in his mind long enough to dictate or write out his wishes, and to execute the will with the essential formalities.

8. Same—Parent and Child—Kindness—Persuasion.

Acts of kindness or consideration shown by a child to an aged or sick parent do not, of themselves, show such undue influence upon the latter as will affect the validity of his will disposing of his property in favor of this child; nor will mere persuasion have this effect, where the testator has not been prevented from exercising his free volition; for such acts, to have the effect stated, must amount to such domination by the stronger over the weaker mind as to amount to the substitution of the will of the former for that of the latter, resulting in an unfair advantage over others entitled to the testator's favor, and who would naturally receive it, but for the intervention of this designing and controlling influence.

APPEAL by caveator from *Connor, J.*, at the August Term, 1914, of CRAVEN.

Caveat to codicil No. 2 of the will of Eli A. Craven, dated 1 November, 1912, tried before *Connor, J.*, and a jury, at August Term, 1914, of Chatham Superior Court. Eli A. Craven was born in August, 1824, and died in December, 1912, leaving a last will and testament, dated December, 1910, a codicil thereto, dated 11 February, 1911, and a second codicil thereto, dated 1 November, 1912, which is the one to which the caveat was filed. There was no contest as to the will itself, or

the first codicil, it being admitted by the caveators that, at the time of their execution, the testator was of sound mind, having sufficient mental capacity to make the will and the first codicil, and that at the time of making them he was not under any undue influence; but it was charged that, at the time when the second codicil is alleged to have been executed by him, the testator did not have sufficient mental capacity to execute a deed, will or codicil, and, besides, that he was induced to annex it to his will and the first codicil by the undue and fraudulent influence of the beneficiary thereunder, Mrs. Flora Underwood, and her husband, W. J. Underwood, being then a very old man and greatly enfeebled in mind and body. That he was under the care of the Underwoods at that time, and by reason of his imbecility and their power and influence over him, which they fully and freely exercised, the second codicil was procured by them, whereby he materially changed the disposition of his property, in favor of Mrs. Flora Underwood, who was his daughter, and to the detriment, if not the entire disinherison of John W. Craven, his son, and his grandsons, one of them his namesake, who had an equal claim with his daughter, Mrs. Underwood, upon the testator's favor and bounty.

The court submitted the following issues to the jury, which were answered by them as indicated:

1. Is the paper-writing dated 6 December, 1910, and every part thereof, propounded, the last will and testament of Eli A. Craven? Answer: "Yes."

2. Is the paper-writing dated 11 February, 1911, and every part thereof, propounded, a codicil to the last will and testament of Eli A. Craven? Answer: "Yes."

3. Is the paper-writing dated 1 November, 1912, and every part thereof, propounded, a codicil to the last will and testament of Eli A. Craven? Answer: "Yes."

Judgment was entered thereon, declaring the will and codicil to be valid and ordering them to probate, and caveators appealed.

R. H. Hayes, F. W. Bynum, H. F. Seawell for caveator.
A. A. F. Seawell, R. G. Dixon and Siler & Milliken for propounder.

WALKER, J., after stating the case: There was much testimony received upon the issues thus joined between the propounders and the caveators, as to the validity of the second codicil to Mr. Craven's will, but we do not deem it material that it should be stated here, except to say that there was strong evidence coming from the side of the caveators to sustain their allegations, both as to the mental incapacity of the testator and as to the fraud and undue influence of Mrs. Underwood

and her husband, and, upon this testimony, the jury might well have given their verdict to the caveators, but there was evidence offered by the propounders, and the Underwoods, to show the contrary, and in this conflict of the testimony the case was properly one for the jury to find the facts and declare what was the truth of the matter.

There are several questions of evidence in the case, but on a careful examination of the record we do not think that, if there was any error in the rulings of the court in respect to them, it constitutes sufficient ground for granting a new trial. It is not any and every error committed during the course of a trial that should induce an appellate court to set aside a verdict and judgment and award a new trial, as before this is done there should be both error and prejudice to the appellant. If he is not hurt by the ruling to which exception was taken, there is no reasonable ground of complaint. We thus referred to this principle in *S. v. Smith*, 164 N. C., 480, and more recently in *S. v. Hearener*, 168 N. C., 163, and *Ferebee v. Berry*, 168 N. C., 282: "The foundation of the application for a new trial is the allegation of injustice, and the motion is for relief. Unless, therefore, some wrong has been suffered, there is nothing to be relieved against. The injury must be positive and tangible, not theoretical merely. For instance, the simple fact of defeat is, in one sense, injurious, for it wounds the feelings and disappoints the defeated party. But this alone is not sufficient ground for a new trial. It does not necessarily involve loss of any kind, and without loss or the probability of loss there can be no new trial. The complaining party asks for redress, for the restoration of rights which have first been infringed and then taken away. There must be, then, a probability of repairing the injury; otherwise the interference of the Court would be but nugatory. There must be a reasonable prospect of placing the party, who asks for a new trial, in a better position than the one which he occupies by the verdict. If he obtain a new trial, he must incur additional expense, and if there is no corresponding benefit, he is still the sufferer. Besides, courts are instituted to enforce right and restrain and punish wrong. Their time is too valuable for them to interpose their remedial power idly and to no purpose. They will not interfere, therefore, where there is no prospect of ultimate benefit."

The alleged declaration of the testator, some six or eight months before the date of the second codicil, to the witness E. F. Craven, as to "the efforts of Will Underwood to get the farm," with an expression of a desire by him that the witness should defeat them, might well have been admitted by the court as some, though exceedingly slight, evidence of undue influence, but in view of the special facts and circumstances of this case, and of the evidence showing a decided change afterwards in

the mental attitude of the testator towards his daughter, we do not think that its exclusion was so prejudicial as to justify us in granting a new trial because of it, and had it been admitted, we are of the opinion that it would not have affected the verdict one way or another. There was much stronger testimony in the case, as to what the testator's wishes were at the time of the conversation with this witness, and the evidence rejected was cumulative only, and added little or no weight to that which was admitted and heard by the jury. Its influence upon the verdict, if any, would have been exceedingly remote and attenuated. We are, therefore, of the opinion that the ruling was not prejudicial, because the proposed testimony was so inconsiderable in its bearing upon the issue, and of such little moment, so far as it had any probative force at all, that unless the case had been evenly balanced, it could not have turned the scales to the other side.

It is not by any means clear how the testator expected W. J. Underwood would try to get the land, whether by foul means or fair, or whether before or after the testator's death, nor whether his wife was expected to participate in his conduct or benefit by it. There is good reason for the belief that he was not referring to any undue influence to be exercised upon him, but to some other kind of effort. He evidently felt that he was unable to take care of himself in regard to it, but wanted some one to look after it when he was gone. In any view of the matter, we do not regard the evidence as of sufficient importance to make its exclusion the proper basis for a new trial. The rejection of the other evidence worked no harm, if it was erroneous.

The letter of Mrs. Flora Underwood, the beneficiary under the second codicil, as to the state of her father's health and mind, was written and dated 22 December, 1909, long—nearly three years—before the second codicil was made, and it is admitted that, at the time of the execution of the will and first codicil, Mr. Craven was mentally sound and capable of making them, and, moreover, was not affected by any undue influence. *Waterman v. Whitney,* 11 N. Y., 157. When sanity or mental capacity is shown to exist, at any particular time, the law presumes that it continues until the fact is shown to be otherwise. If there is no evidence at all in regard to one's mental condition, there is a presumption of sanity or mental capacity. He who alleges the contrary must prove it. This very question arose in the noted will case of *Wood v. Sawyer,* 61 N. C., 277, where *Justice Reade* said: "Sanity is the natural and usual condition of the mind, and, therefore, every man is presumed to be sane. But this presumption may be rebutted, *i. e.,* the contrary may be proved, in any given case. What amount of evidence is sufficient to rebut it is a question, not of law for the court, but of fact for the jury. When the presumption is rebutted and insanity is estab-

lished, then there is a presumption that insanity continues. But the presumption may be rebutted, *i. e.*, the contrary may be proved to be the fact. What amount of evidence is sufficient to rebut it is also a question, not of law, but of fact. If it was established in this case that the testator was insane at any time, then insanity is presumed to have continued. But the presumption might be rebutted. And what amount of evidence was sufficient to rebut it was a question not of law, but of fact." It is admitted that even if Mr. Craven's mind was affected, or impaired, on 22 December, 1909, by his falling from the buggy, on account of being benumbed by the intense cold, it was, afterwards, fully restored, so that he had the full possession of his faculties when he executed his will and the first codicil, and, therefore, they were valid acts of his. This being so, we do not see how the letter of Mrs. Underwood, as to his mental condition at that time, becomes material, and it may be said, at the least, that it had no important or material bearing on the case and would not have changed the result.

The attack on the witness C. E. Kinnamon could not be made by showing his bias without first directing his attention to the impeaching evidence, and recalling the circumstances, so that he might have an opportunity to admit, deny or explain it. *S. v. Patterson*, 24 N. C., 346. Where the matter in question is entirely collateral to the issue, the answer of the witness, proposed to be contradicted or impeached, is conclusive and binding upon the party asking the question. Where the matter is involved in the issue, or materially connected with it, and not collateral, the witness may be contradicted without being questioned in regard to it, although even then it would be fair to him that it should be done; and where it is collateral, but shows bias, temper or disposition of the witness towards the parties or the cause, he should be given the proper warning. *Clark v. Clark*, 65 N. C., 655; *Jones v. Jones*, 80 N. C., 246; *S. v. Patterson, supra; S. v. Lewis*, 133 N. C., 653; *S. v. Crook, ibid.*, 672; *Kramer v. Light Co.*, 95 N. C., 277. The account book offered in evidence had no relevancy to the issues. If the caveators intended to show thereby the desire of the testator for an equal division of his property among his descendants, that fact sufficiently appeared from the will itself, as it was framed before the second codicil was executed.

Caveators requested the court to instruct the jury as follows: "A will or codicil made by a person who is unable to originate an idea, or in his own powers express a wish, and whose only mode of communication is by adopting or rejecting suggestions made by others, is invalid." As we understand the law, there is no special formula for charging the jury as to the mental capacity required for the valid execution of a deed or will. We are of the opinion, though, that the court gave the instruction

substantially, in its direct response to the prayer, and at any rate it stated and explained the law fully and correctly in subsequent parts of the charge. The court virtually told the jury that, in order for the codicil to be valid, they must find, as a fact, that the testator had mental capacity sufficient to execute it, that is, that he knew at the time the nature and effect of his act; that he was making a will, by which he was disposing of his property, and to whom he was giving it and how, and that he comprehended the relationship of the parties to him. This, though not very full, sufficiently complied with the rule so often stated by this Court. *Horne v. Horne,* 31 N. C., 99; *Bost v. Bost,* 87 N. C., 477; *Paine v. Roberts,* 82 N. C., 451; *Barnhardt v. Smith,* 86 N. C., 473; *Moffit v. Witherspoon,* 32 N. C., 185; *Cornelius v. Cornelius,* 52 N. C., 593; *Cameron v. Power Co.,* 138 N. C., 365; *Sprinkle v. Wellborn,* 140 N. C., 181. The jury manifestly understood what was meant. It is not necessary that the testator should be able to dispose of his property with judgment and discretion—wisely or unwisely, for he may do with his own as he pleases; but it is enough if he understands the nature and effect of his act and knows what he is about. *Bost v. Bost, supra; Cameron v. Power Co., supra.* Besides, the request of the defendant that the court charge in the language taken from the case cited in the brief did not confine the judge to the words thus chosen by the counsel, but he could use his own language to express substantially the same idea, if it was in itself correct. It may well be doubted if the prayer was warranted by the evidence.

It follows that one who is incapable at the moment of comprehending the nature and extent of his property, the disposition to be made of it by testament, and the persons who are or should be provided for, is not of a sound, disposing mind. And if this mental condition be really shown to exist, the will must fail, even though he may have a glimmering knowledge that he is endeavoring to make a testamentary disposition of his property. It is here to be observed that some of the earlier cases have laid down the rule of testamentary capacity with much more subservience to and consideration for the purported expression of one's last wishes. They seem to have assumed that there must be a total want of understanding in order to render one intestable; that a court ought to refrain from measuring the capacity of a testator, if he have any at all; and that unless totally deprived of reason and *non compos mentis,* he is the lawful disposer of his own property, so that his will stands as a reason for his actions, harsh as may be its provisions. This ascribes altogether too great sanctity to the testamentary act of an individual as opposed to the law's own will set forth by the statutes and founded in common sense; and it is well that the best considered of our latest cases recede from so extreme and false a standard. Notwithstanding the

modern rule to be favored, we should still, however, bear in mind that incapacity is more than weak capacity; and, as already intimated, mere feebleness of mind does not suffice to invalidate a will, if the testator acted freely and had sufficient mind to comprehend intelligently the nature and effect of the act he was performing, the estate he was undertaking to dispose of, and the relations he held to the various persons who might naturally expect to become the objects of his bounty.

While it is true that it is not the duty of the court to strain after probate, nor in any case to grant it where grave doubts remain unremoved and great difficulties oppose themselves to so doing, neither is it the duty of the court to lean against probate, and impeach the will merely because it is made in old age or upon the sick bed, after the mind has lost a portion of its former vigor and has become weakened by age or disease. Weakness of memory, vacillation of purpose, credulity, vagueness of thought, may all consist with adequate testamentary capacity, under favorable circumstances. And a comprehensive grasp of all the requisites of testamentary knowledge in one review appears unnecessary, provided the enfeebled testator understands in detail all that he is about, and chooses rationally between one disposition and another. Schouler on Wills, 2 Ed., 68 to 72, and notes. In the important case of *Delafield v. Parish*, 25 N. Y., 9, the Court, after announcing the fairer rule of testamentary capacity above set forth, spoke of the testator's mind as acting without external pressure wherever it acted properly. "The testator must, said the Court, "have sufficient active memory to collect in his mind, without (insidious) prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in regard to them"; and we may add, long enough to have been able to dictate or write out his wishes, and to execute the will with all due formalities.

The charge as to undue influence was in all respects sufficient under our decisions. While undue influence does not necessarily involve moral turpitude or even a bad or improper motive, if a person with even the best of motives has acquired a dominant power or influence over the mind of the testator or grantor, so that he is thereby induced to execute a deed, will, or other instrument materially affecting his rights or his property which he would not have made but by subjection to this controlling influence, so that it is not the product of his own will, or desire, freely and fairly exercised, but expresses only the mind and will of the other party, who procured the result, such an instrument, so obtained by this undue influence of the party having the superior power, may not unfairly or improperly be termed a fraudulent one. The chief inquiry is, Was the free-agency of the party upon whom the influence of the

other was exerted destroyed, so that the will of the party for whose benefit or at whose instance the instrument was executed took the place of his will, which was suppressed? This undue influence is generally found to exist between persons occupying a confidential relation, which gives one a superior advantage over the other, but it may just as well exist where one of them occupies the simple position of the stronger over the weaker, however this dominance may have been acquired or the disparity in will-power has been brought about. *McRae v. Malloy,* 93 N. C., 154. The cases decided in this Court which support the foregoing views as to what is undue influence are many and harmonious. *Myatt v. Myatt,* 149 N. C., 137, and cases cited; *Horah v. Knox,* 87 N. C., 490; *Wessell v. Rathjohn,* 89 N. C., 382; *Wright v. Howe,* 52 N. C., 412; *In re Abee's Will,* 146 N. C., 273. In *Wright v. Howe, supra, Judge Manly* said, at page 413: "Undue influence is defined to be an influence by fraud or force, or by both, and, in its application to the making of a will, signifies that through one or both of these means the will of the decedent was perverted from its free action or thrust aside entirely, and the will of the influencing party substituted for it. This definition is substantially given when the jury are told, 'It is a fraudulent influence overruling or controlling the mind of a person operated on.'" But while undue influence, as thus defined, may avoid a will, whether it was exerted by the beneficiary or any other in her behalf, is a deduction to be made by the jury from all the evidence. The mere fact that Mrs. Underwood was the testator's daughter and that she and her husband lived with him during his last illness and for some time prior to his death, and that they were kind and attentive to him in his last days, so that he became more favorably disposed towards his daughter than formerly, will not constitute undue influence, or, standing alone, be sufficient to warrant a jury in finding that it existed. It is not unnatural for a father to be grateful to his child, when she has shown him every mark of true and unselfish devotion at a time when he most needed it. Even moral suasion and entreaty will not invalidate a deed or will from a father in favor of his child, if fairly, legitimately and properly used, nor will the relation of parent and child give rise to any presumption of fraud or undue influence.

It was said in *Taylor v. Taylor,* 41 N. C., at page 27, by *Judge Pearson,* that, "Fair argument and persuasion may be used to obtain the execution of a deed or will. There is no evidence in this case that any advantage was taken or any undue influence exercised. The plaintiff fails entirely to make out a ground to assail a will, much less a deed." And in *Gash v. Johnson,* 28 N. C., at p. 292, *Judge Daniel* said that "A will certainly is not void because it has been obtained *by persuasion.* To make it void, the persuasion must be undue and fraudulent." The

courts have uniformly held that influence gained by kindness and affection will not be regarded as "undue" if no imposition or fraud be practiced, even though it induce the testator to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made. *Re Gleespin's Will*, 26 N. J. Eq., 523. Nor will the mere relation of parent and child, though in a certain sense confidential, raise a presumption of undue influence. *Lee v. Lee*, 71 N. C., 139. Nor will the fact that the testator, on his death-bed, was surrounded by beneficiaries in his will. *Bundy v. McKnight*, 48 Ind., 502. Nor will the circumstance that the testator, an old and helpless man, made his will in favor of a son who had cared for him and attended to his business affairs, his other children having forsaken him. *Elliott's Will*, 2 J. J. Marsh, 340 (Redf. Am. Cases on Wills, 434).

It would be a great reproach to the law if, in its jealous watchfulness over the freedom of testamentary disposition, it should deprive age and infirmity of the kindly ministrations of affection, or of the power of rewarding those who bestow it. These views were strongly approved and commended by the Court in *Mackall v. Mackall*, 135 U. S., 167 (34 L. Ed., at p. 84), where the conclusion was reached that, in a legal sense, undue influence must destroy free agency.

"It is well settled," said *Justice Brewer*, "that in order to avoid a will on the ground of undue influence it must appear that the testator's free agency was destroyed and that his will was overborne by excessive importunity, imposition or fraud, so that the will does not, in fact, express his wishes as to the disposition of his property, but those of the persons exercising the influence." The Court then also used language closely applicable to the facts of our case: "That the relations between this father and his several children, during the score of years preceding his death, naturally inclined him towards the one and against the others is evident, and to have been expected. It would have been strange if such a result had not followed; but such partiality towards the one, and influence resulting therefrom, are not only natural, but just and reasonable, and come far short of presenting the undue influence which the law denounces. Right or wrong, it is to be expected that a parent will favor the child who stands by him, and give to him, rather than the others, his property. To defeat a conveyance under those circumstances, something more than the natural influence springing from such relationship must be shown; imposition, fraud, importunity, duress or something of that nature must appear; otherwise that disposition of property which accords with the natural inclinations of the human heart must be sustained." And more apt are the words of this Court in *Wessell v. Rathjohn*, 89 N. C., at p. 382, as the relation there was that of father and

daughter. *Justice Merrimon* said: "It is not strange or unnatural that a father, feeble in health, of weak mind, and easily influenced by a daughter having opportunity to exercise such influence, should give his daughter a house and lot and execute to her a deed for it. It is natural that the father should provide for his daughter; this is a proper and orderly thing to be done. It is what the paternal feelings of good men prompt them to do; it is what just men commend and the law tolerates. Why should the law cast suspicion upon such a transaction? When the transaction, the deed, is right in itself, such as the law tolerates and the common sense of men approves as just, reasonable and commendable, and there is the absence of the relations of suspicion founded on motives of policy, no adverse presumption arises; on the contrary, the law presumes such deed or transaction in all respects proper and just, until the contrary is made to appear. The burden is on him who alleges the contrary, to prove it. There is no natural presumption, nor is there any founded in motives of policy, that parent and child will take advantage of one another; the laws of human nature forbid this, and he who alleges the contrary must prove it."

The question of undue influence at last comes to this, that it is not whether the testator or grantor knew what he was doing, had done, or proposed to do, but how *the intention was produced;* whether the beneficiary took advantage of his superior or dominant position, and used it unjustly and unfairly to acquire the particular benefit or interest, without there being that care and providence placed around the weaker person, whose bounty is the desired object, as against those who occupy the better position—the result being that the will of the testator is perverted thereby, and is unable to perform its natural function, and the final act ceases to be voluntary. *Huguenin v. Baseley,* 14 Vesey, 273. It must be a controlling influence which is exercised for the purpose of gaining an unfair advantage over others entitled to the testator's favor, and who would naturally receive it but for the intervention of this designing influence, which is brought to bear upon one unable to resist it, because his volition is overcome.

We have examined the case with care and can find no error in the record.

No error.

J. B. BARROW v. PHILADELPHIA LIFE INSURANCE COMPANY.

(Filed 6 October, 1915.)

1. Insurance, Life—Application—Medical Certificate.

Where recovery upon a policy of life insurance is resisted upon the alleged grounds that the insured has made false statements in his application, as to his having palpitation of the heart and other organic troubles, the plaintiff may introduce in evidence the medical certificate of the company's regular medical examiner, attached to the policy, tending to corroborate the contention of the plaintiff that the deceased was in good health at the time of the issuance of the policy, and in contradiction of the defendant's evidence on the question.

2. Same—Evidence—Medical Expert.

Where an insurance company resists payment of matured life insurance under its policy, and the certificate of the company's medical examiner, attached to the policy, has been introduced in evidence, it is competent to ask a medical expert witness whether, upon the matters stated in the certificate, the insured could have had heart trouble at the time, when the question is material to the controversy.

3. Insurance, Life—Application—Statements—Physicians—Consultations—Evidence—Trials—Instructions.

In this case it is contended by a life insurance company, as a defense to the payment of its matured policy, that the insured had untruly stated in his application that he had not previously consulted other physicians than those he has named, and there is evidence that he had conversations with other physicians about his physical condition. The charge is approved as to whether these conversations were merely incidental or amounted to a consultation.

APPEAL by defendant from *Carter, J.*, at February Term, 1915, of CRAVEN.

Moore & Dunn for plaintiff
Rouse & Land for defendant.

CLARK, C. J. This action is for recovery of the amount of an insurance policy upon the life of W. M. Bagley which had been duly assigned by him to the plaintiff. The defendant alleged that the insured in his application had made misrepresentations as to the name of the last physician who had been consulted by him prior to the application, and also that he had untruly represented therein that he was in good health at the time; that he had never had any palpitation or any disease of the heart nor chronic dyspepsia or disease of the stomach. These allegations were denied and raised issues of fact which were all found by the jury in favor of the plaintiff.

The first four assignments of error were abandoned. The fifth assignment was that the court permitted the admission of the medical certificate of Dr. Loftin which was attached to the application, it being shown

that he was the regular medical examiner of said company. This certificate was competent because it was part of the application and tended to corroborate the contention of the plaintiff that the deceased was in good health at the time of the issuance of the policy and was competent in contradiction of the allegations of the witnesses of defendant concerning the conditions under which the policy was issued.

The sixth assignment of error was that a physician was asked the hypothetical question, if this statement annexed to the application by the medical examiner for the defendant was true, whether the applicant could have had heart trouble. We are aware of no ground upon which this testimony could have been excluded. It was expert evidence which would materially aid the jury in coming to a conclusion as to the disputed fact whether the applicant had misrepresented his condition in that respect.

Assignments of error 7, 8, 9 and 10 are to the charge of the court on the second issue. This charge submitted to the jury whether they should find upon the facts deposed that certain conversations between the applicant and one or more physicians was merely an incidental matter or amounted to a consultation which made untrue the representation that the last physician consulted was Dr. Jones, in 1897, as stated in the application. We think the matter was fairly presented in the charge, and the jury found it against the defendant. They found that the deceased did not consult these doctors as physicians or professionally.

The case turned almost entirely upon disputed matters of fact, which were correctly presented to the jury under a very clear and impartial charge by the trial judge, and upon examination of all the assignments of error we do not find that a more minute discussion is needed. The applicant died in a few months after the policy was granted, and the defendant seems to have thought that, therefore, he must have been in bad health at the time of the application and had made misrepresentations. But the jury, upon all the evidence, found contrary to this contention.

No error.

ELIZABETH BARFIELD ET ALS. V. F. L. CARR, ADMINISTRATOR OF A. R. HINSON, ET AL.

(Filed 6 October, 1915.)

1. Wills—Cancellation in Part—Lapsed Legacies—Residuary Clause—Interpretation of Statutes.

A will may partially be revoked in its material parts by canceling, tearing, etc.; and where the testator has named several beneficiaries in a residuary clause, and it appears upon the face of the will that several of these names have been run through with a pen, and the intention of the testator to revoke has been established, the beneficiaries whose names have been thus erased take nothing, and the whole estate, under the residuary clause, goes to the others therein named, together with such legacies as may have lapsed. Revisal, sec. 3142.

2. Wills—Cancellation in Part—Evidence—Declarations.

Where it appears upon the face of a will that the names of certain beneficiaries in the residuary clause have been stricken out by pen, evidence of declarations of the testator made since the execution of the will, that he meant to strike the parties from the will, and that the witness was to see that they did not share in his estate, are competent.

3. Wills—Cancellation in Part—Trials—Burden of Proof.

In an action brought to interpret a will and declare it canceled in part as to certain beneficiaries whose names thereon appear to be marked out by pen, the burden of proof is on the plaintiffs.

APPEAL by defendants from *Connor, J.*, at the February Term, 1915, of GREENE.

Civil action tried upon these issues:

1. Did A. R. Hinson draw the pen lines through the names of Lillian Phillips, Alex. Hagan and Minnie Taylor and through the words giving to each one share, as appears in item 6 of his last will and testament, as alleged? Answer: "Yes."

2. If so, did the said A. R. Hinson draw said lines through said names and words with intent to cancel or obliterate so much of said will as gave to Lillian Phillips, Alex. Hagan and Minnie Taylor to each one share of his estate? Answer: "Yes."

3. Did A. R. Hinson draw the pen lines through the words "of my nephew, Will Hinson, one share," as appears in item 6 of his last will and testament, as alleged? Answer: "Yes."

4. If so, did the said A. R. Hinson draw said lines through said words with intent to cancel or obliterate so much of said will as gave to Hannah Hinson one share of his estate? Answer: "Yes."

From the judgment rendered, the defendants appealed.

Jarvis & Wooten for the plaintiffs.

Albion Dunn, W. F. Evans and J. Paul Frizzelle for defendants.

BROWN, J. This action is brought to determine the rights of plaintiffs and defendants under the will of Adam Hinson. The will was found soon after testator's death, the sixth item being canceled and obliterated in part as follows:

"6. It is my will and desire that all the residue of my property, after the sale of the real estate provided in above section, shall be divided equally and paid over, share and share alike, to each of the following, towit:

"To my niece Elizabeth Barfield one share.

~~"To my niece Lillian Phillips one share.~~

A. R. Hinson.

~~"To my nephew Alex. Hagan one share.~~

"To my niece Sunie Hinson one share.

"To my niece Dicie Hinson one share.

"To my niece Hannah Hinson, the wife

~~of my nephew Will Hinson, one share.~~

A. R. Hinson

~~"To my niece Minnie Taylor one share.~~

"To my niece Matilda Barfield one share."

It was admitted by all parties that the will was duly executed by A. R. Hinson, and that the lines drawn through the words in the sixth item of the will were made after the said testator signed and executed the will. It was also admitted that Sunie Hinson, one of the devisees, died during the lifetime of the testator.

This action was brought by the plaintiffs against Hannah Hinson and the defendants whose names appear to have been canceled, in which they set up that they were entitled to the entire proceeds of the estate devised under item 6 of the will, and ask for an interpretation of the will. The defendants deny the cancellation of the legacies to them was the act of the testator, or that he intended to revoke them, and they further contend that in any event if revoked those shares would not go into the residuum, but claim that as to those the testator died intestate.

It is well settled that there may be a partial revocation of a will by canceling, tearing, etc., as to material parts. *In re Wellborn Will,* 165 N. C., 636; *Cutler v. Cutler,* 130 N. C., 1.

To constitute an effective revocation there must appear some manifest act or symbol of destruction, and then there must appear the intention of the testator to revoke. In the case at bar the jury have found both the act and the intention. In submitting those issues, the court prop-

erly put the burden on plaintiffs upon each issue, and in every respect the charge is free from error and is a clear presentation of the case to the jury.

There are only two assignments of error on this appeal that we deem it necessary to discuss:

1. The court permitted the introduction of witnesses who testified as to conversations with testator after his will was executed, in which he told these witnesses that he meant to strike out of his will the names of these defendants and to see that they did not share in his estate. The admissibility of such evidence is fully discussed *In re Shelton's Will,* 143 N. C., 221, cited and approved *In re Wellborn, supra,* and its competency upheld.

Those cases follow *Reel v. Reel,* 8 N. C., 248, in which it is said by *Chief Justice Henderson*: "In our minds, to reject the declarations of the only person having a vested interest and who was interested to declare the truth, whose fiat gave existence to the will, and whose fiat could destroy, and in doing the one or the other could interfere with the rights of no one, involves almost an absurdity; and (with due deference to the opinions of those who have decided to the contrary, we say it) they are received, *not* upon the ground of their being a part of the *res gestæ,* for whether they accompany an act or not, whether made *long before or long after* making the will, is entirely immaterial as to their competency; those circumstances go to their weight or credit with the tribunal which is to try the facts, and the same tribunal is also to decide whether the declarations contain the truth or are deceptive, in order to delude expectants and procure peace." See, also, 3 Wigmore on Ev., sec. 1738.

2. The other question we will consider relates to the disposition the law makes of the legacies revoked by cancellation and the one that lapsed by the death of the legatee during the lifetime of the testator.

We are of opinion that such legacies fall into the residuum and go to the residuary legatees under section 3142, Rev., which reads as follows: "Unless a contrary intention appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or become void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will."

The point is expressly decided in *Duckworth v. Jordan,* 138 N. C., 525; *Saunders v. Saunders,* 108 N. C., 327; *Battle v. Battle,* 116 N. C., 161.

No error.

CHARLES W. CONWAY v. CITY OF KINSTON AND LENOIR OIL AND ICE COMPANY.

(Filed 13 October, 1915.)

Negligence—Pleadings—Demurrer—Municipal Corporations—Secondary Liability—Streets and Sidewalks—Nuisance.

A complaint in an action to recover damages for an injury to a nine-year-old child states a good cause of action when it alleges that the defendant negligently emptied, from its manufacturing plant, quantities of hot water which flowed in an uncovered and unprotected ditch, without any sign of warning, along the edge of a city's sidewalk, obscured by vegetable growth and the steam arising from the hot water, and that the child was seriously injured by falling therein and being scalded; for such, when established, constitute actionable negligence, from the consequences of which the defendant may not relieve itself upon the ground that such conditions amounted to a nuisance, which the city, its co-defendant, should have sooner abated, the liability of the city, if any, being secondary to that of the defendant manufacturing company.

APPEAL by defendant from *Peebles, J.*, overruling a demurrer by the Oil and Ice Company, at June Term, 1915, of LENOIR.

G. G. Moore and C. L. Abernethy for plaintiff.
Rouse & Land for Oil and Ice Company.

CLARK, C. J. The complaint alleged that the defendant Oil and Ice Company emptied from its plant through a 90-foot pipe into an open ditch on the edge of the sidewalk of a city street hot scalding water, said ditch being uncovered, about 3 feet deep and about 2 feet wide, containing extremely hot water at a depth of from 12 to 24 inches, and that along the edge of the said ditch weeds, tall grass and vapor from said hot water and other obstructions obscured the sight of said ditch, whereby the plaintiff, a child of 9 years of age, who sues by its next friend, fell into said ditch which was left negligently uncovered without sign, signals, lights, or other warnings, whereby the child was seriously injured, and that this was a nuisance which the defendant oil company had maintained for many years, and that the same was actionable negligence. The defendant Oil and Ice Company demurred upon the ground that the ditch was not on its premises, but on the edge of the street of the city, and that no cause of action is stated for that reason, and also on the further ground that it was not fixed with the duty of keeping down the grass and weeds along said ditch. The city did not join in the demurrer.

The demurrer was properly overruled. If the defendant did turn loose a dangerous agency such as hot scalding water into an open ditch along the edge of the street, it was negligence not to safeguard it by a cover or using terra-cotta or iron tubing. It was no protection to this defendant that the city did not take steps to abate the nuisance or re-

quire that the hot water should be poured into a tube in said ditch, or otherwise covered, as a protection to the public.

In *Palmero v. Mfg. Co.*, 130 La., 833, 40 L. R. A. (N. S.), 671, a child of four years of age fell into a street gutter containing hot water which had flowed from the defendant's plant, and was painfully burned. It was held that the defendant was liable for damages, the Court saying: "On principle there is no difference between hot water and a dangerous machine left unguarded in a public place."

In *Smith v. Electric Co.* (Mass.), 15 L. R. A. (N. S.), 957, it was held that where the defendant turned steam into a sewer in such quantities that it enveloped a pedestrian on the sidewalk, whereby he became bewildered and was injured, the company was liable.

In *Aurora v. Seidelman*, 34 Ill. App., 285, a ditch had been dug in the street for the purpose of laying water pipes, and water had been run in to soften the dirt to make it settle more speedily, whereby the bank caved in, and no guard being stationed, it was held that the defendant was liable for the death of a child who was watching a frog in the ditch when the ground beneath gave way, which threw him into the ditch and fatally injured him.

In *Kerpi v. Mining Co.* (Minn.), 131 N. W., 372 (see, also, 34 L. R. A. (N. S.), 118, and notes), upon a complaint which charged that the defendant maintained an unprotected vat in the public street into which it discharged hot water from a boiler on its adjoining property, and a child passing by, stopping to look at the vat, was alarmed by other children playing in the vicinity, which caused him to slip and fall into the vat to his serious injury, it was held that the proximate cause of such injury was the unguarded vat.

The duty of cities and towns to keep the streets and sidewalks in proper repair and to forbid or remove nuisances thereon which are likely to cause injury is discussed and maintained in *Bunch v. Edenton*, 90 N. C., 434.

When injury results from nuisances on the streets, it has always been held that the person causing such nuisance, if it produces injury, is liable primarily and the city or town is liable secondarily for its negligence in not abating said nuisance. *Brown v. Louisburg*, 126 N. C., 703; *Raleigh v. R. R.*, 129 N. C., 265; *Gregg v. Wilmington*, 155 N. C., 31; *Guthrie v. Durham*, 168 N. C., 573.

Mr. Moore, of counsel for plaintiff, calls to our attention in his brief the following quotation from *Gibson v. Huntingdon*, 22 L. R. A., 564, which case has been cited by the defendant:

"Was the child using the road for a lawful purpose? Children are not responsible for the choice of their parents, nor the place or condition of their birth. God decides these for them when he breathes into them the breath of life. Poor parents are unable to provide a place of

healthful exercise and play for their children, but it requires all their earnings to clothe, feed and shelter them. The law prohibits them, under the penalty of being trespassers, from entering on the lands of others; and now to forbid them to use the road to its utmost boundary for the purpose of play, when not interfering in any manner with the traveling public, would savor too much of the dark ages of barbarism, when children were subjected to inhuman and diabolical punishments, and their lives were at the mercy of those having charge over them. It is the only commons they now have, and to confine them in the narrow limits of their cheerless tenement houses would be cruel, unjust, and oppressive, blight their young lives, and render their bodies weak, sickly, scrofulous and vile; and if they could manage to escape the long list of contagious diseases so fatal to their kind, they would grow up to adult age morbidly despising laws so tyrannous and unworthy a civilized and liberty-loving people. It is a right they have immemorially enjoyed, and should continue so to do as long as the public fails to provide them other free commons where they can have the pure air, bright sunshine and sportive exercise so necessary to the healthful growth of their sensitive bodies. Horses, cattle, hogs, dogs and other domestic animals are all at large in the streets, unless prohibited by special ordinance; and why not children?"

An adult sustaining injury under these circumstances could recover damages, if not shown guilty of contributory negligence.

The judgment overruling the demurrer is

Affirmed.

L. D. BRYAN v. D. R. CANADY ET ALS.

(Filed 13 October, 1915.)

1. Deeds and Conveyances — Pleadings — Equity — Specific Performance — Decrees.

Where in an action to enforce specific performance of an option on land it appears from the pleadings and admissions of the parties that the defendant had agreed to include within the terms of the option a certain other tract of land, which was omitted by their mutual mistake, that the entire consideration had been paid, including the execution of notes for the deferred payments to be made on the purchase price of the lands, with mortgage to secure their payment, it is held that a decree was properly entered in the court below that the vendor convey to the purchaser the tract thus omitted, and that the latter should execute a mortgage thereon as further security for the notes given for the purchase price; and in default thereof the decree should be registered as a conveyance in accordance with the provisions of the statute.

2. Deeds and Conveyances —Pleadings—Equity—Specific Performance—Allegations—Prayers for Relief—Issues.

In a suit for specific performance of an option to convey land, the complaint alleging an omission by mutual mistake of the parties of one of

the several tracts intended to be conveyed by the option, which the answer denied: *Held*, that the issue thus raised was subsequently rendered immaterial by the defendant admitting in open court that he had executed the option alleged, and that it included the tract in question, which had not been described in the conveyance.

3. Pleadings—Amendments—Prayers for Relief—Judgment—Presumption.

Where an amended complaint has been allowed in the Superior Court and filed, and asks for no relief except by reference to the original complaint, which is not sent up in the record on defendant's appeal, it will be assumed that the prayer corresponded with the facts stated and was suited to the relief granted, if a prayer was essential.

4. Same—Record—Appeal and Error—Absence of Prayers for Relief.

The relief to be granted in an action does not depend upon that asked for in the complaint; but upon whether the matters alleged and proved entitle the complaining party to the relief granted, and this is so, in the absence of any prayer for relief.

5. Pleadings—Issues—Matters Alleged—Specific Performance—Separate Conveyances—Equity—Reformation.

Where the purpose of the suit, as it appears from the matters alleged in the complaint, was to call for a separate deed to a tract of land omitted by the mutual mistake of the parties from the conveyance made in carrying out an option of purchase thereof, and it is the evident intention of the plaintiff, as gathered from the complaint, not to have the deed reformed, but to compel a conveyance of the tract omitted, an issue involving the right of the plaintiff for reformation of the deed does not arise on the pleadings.

APPEAL by defendants from *Connor, J.*, at the July Term, 1915, of ONSLOW.

The action was brought for the specific performance of an "option" by which defendants agreed for a valuable consideration, to convey five tracts of land to the plaintiff. An attorney was retained to draw the deed, and by an inadvertence not attributable to him, but to the mutual mistake of the parties themselves, as alleged, one of the tracts, viz., the fifth tract described in the contract, was omitted from the deed. When this was discovered by the plaintiff, before the expiration of the time fixed by the option to call for a conveyance of the land, plaintiff requested defendants to execute to him a deed for the fifth tract, offering at the time to give a mortgage on the same as further security for the payment of the purchase money, as had been done in the case of the first four of the tracts at the time of the conveyance of them to him, but with this reasonable demand the defendants refused to comply.

Defendants, in their answer, denied that they agreed to sell the fifth tract of land to the plaintiff or that it was omitted from the deed they made to the plaintiff for the other four tracts, by the mutual mistake of the parties, but at the trial admitted that they executed what is called the "option" set out in the second section of the complaint, which describes the land as "all the real estate belonging to the defendants and

situated in Onslow County, in Stump Sound Township, on the west side of New River, including the entire possession of the said defendants and all the lands and oyster bottoms or gardens of every description." It was further admitted that the fifth tract was embraced by the description in the "option," and that "the entire consideration set forth in the option had been paid, including the execution of the notes for $6,500 and a mortgage on the land to secure their payment." Upon the pleadings and these admissions, it appearing that the deed of the defendants did not include, in its description of the land, the fifth tract, the court adjudged that the defendants execute a proper deed to the plaintiff for that tract, at Snead's Ferry Point, with general warranty, according to the terms of the option, and that plaintiff, on receipt of the said deed, or the registration of the same, execute to the defendants an additional mortgage on said tract of land, so that the notes for $6,500 shall then be secured by a lien, by way of mortgage, on all the tracts, as provided by the option, and in case the defendants fail or refuse to comply with this judgment in the respect indicated above, that the decree shall operate as a conveyance, with general warranty from defendants to the plaintiff of said fifth tract of land, and as a mortgage back to the defendants of the same, as additional security in accordance with the foregoing terms of the judgment. Provision was made in the decree for the clerk to certify the same to the register of deeds, as provided by the statute. The court further adjudged that plaintiffs are entitled to the possession of the land at Snead's Ferry Point, which is tract No. 5, and that a writ of possession be issued by the clerk of the court, at the request of plaintiff, and that he recover his costs. Defendants excepted and appealed.

W. H. Lee, D. E. Henderson, N. E. Day, and McLean, Varser & McLean for plaintiff.

Kellum & Loughlin and Herbert McClammy for defendants.

WALKER, J., after stating the case: The defendants contended that, by their answer, they had raised an issue as to whether the fifth tract of land had been omitted from the description in the deed by the mutual mistake of the parties, and also as to whether that tract was included by the description of the lands in the option. It was not described separately by its name, but was a part of the lands answering to the general description in the deed. So that the issue raised by the answer was waived or rendered immaterial by the subsequent admission, in open court, that defendants executed the contract and that it covered all five tracts, four of which had already been conveyed to plaintiff. The defendants further urged that the suit was brought to correct the deed on the ground of mistake, and they had denied that there was any mistake, but this contention is founded on a misconception of the complaint,

which sets out a cause of action, not for reformation of the deed, but for the specific enforcement of the agreement to sell the land, which had only been partially performed by a conveyance of four of the tracts. There is no specific prayer in the amended complaint, and no prayer at all, except by reference to the former complaint, the prayer of which is adopted, but that complaint was not sent up as a part of the record, though it is referred to as a part thereof. We must assume, though, that the prayer corresponded with the facts stated and was suited to the relief which they entitled plaintiff to have adjudged.

Where an answer is filed, "the court may grant any relief consistent with the case made by the complaint, and embraced within the issue." Revisal, sec. 565. So that the relief awarded depends not upon the particular form of the prayer, but is gauged by the facts stated in the pleading, and the party is entitled broadly to any relief consistent therewith, whether or not he has prayed for it. *Knight v. Houghtalling*, 85 N. C., 17. As the nature and extent of this rule, which obtained under the former equity system, and has been introduced into our present liberal procedure, do not seem to be well understood, it may be profitable to refer to a few of the cases in which it has been stated and administered. Discussing it in *Staton v. Webb*, 137 N. C., 36, 42, *Justice Douglas* said: "This Court has repeatedly held that no prayer is necessary where the appropriate relief sufficiently appears from the allegations of the complaint. In *Knight v. Houghtalling*, 85 N. C., 17, *Ruffin, J.*, speaking for the Court, says: 'We have not failed to observe that the answer of the defendants contains but a single prayer for relief, and that for a rescission of a contract. But we understand that under the Code system the demand for relief is made wholly immaterial, and that it is the case made by the pleadings and facts proved, and not the prayer of the party, which determines the measure of relief to be administered, the only restriction being that the relief given must not be inconsistent with the pleadings and proofs. In other words, the court has adopted the old equity practice, when granting relief under a general prayer, except that now no general prayer need be expressed, but is always implied.' In *Dempsey v. Rhodes*, 93 N. C., 120, *Merrimon, J.*, speaking for the Court, says: 'Indeed, in the absence of any formal demand for judgment, the court will grant such judgment as the party may be entitled to have, consistent with the pleadings and proofs.' See, also, *Harris v. Sneeden*, 104 N. C., 369; *Gattis v. Kilgo*, 125 N. C., 133; Clark's Code, sec. 233 (3)." And in *Voorhees v. Porter*, 134 N. C., 591, 597, we said, referring to the language of the Court in *Woodcock v. Bostic*, 118 N. C., 822, and explaining it: "When the Court said in that case, "She cannot have equitable relief, because she has prayed for none,' it simply meant that there was no sufficient allegation of an equity upon which a prayer for such relief could be predicated, for we find it to be well settled by the

decisions of this Court that if the plaintiff in his complaint states facts sufficient to entitle him to any relief, this Court will grant it, though there may be no formal prayer corresponding with the allegations, and even though relief of another kind may be demanded. *Knight v. Houghtalling, supra; Gillam v. Insurance Co.,* 121 N. C., 369. In the case last cited, *Clark, J.,* for the Court, says: 'Under the Code the demand for relief is immaterial, and the Court will give any judgment justified by the pleadings and proofs,' citing numerous cases. Clark's Code (3 Ed.), p. 584, and notes to section 425." More recent cases are *Councill v. Bailey,* 154 N. C., 54; *Williams v. Railroad Co.,* 144 N. C., 498; *Cedar Works v. Lumber Co.,* 161 N. C., 612; *Baber v. Hanie,* 163 N. C., 588, 590.

The last case cited is very much like this one, the only difference being that in the one there was an equity of subrogation, while in the other there is an equity for correction of a deed. We there said: "The court should not have ordered an amendment of the original complaint. It was quite sufficient, in its allegations, to warrant a recovery upon the theory of subrogation or that of contract. The prayer does not narrow the scope of the pleading to its own limits, but a party can recover now according to the facts he states in his pleading, and not necessarily or only according to his prayer."

In *Knight v. Houghtalling, supra,* the prayer was for rescission of the deed, but while the court refused that equity, it, nevertheless, awarded another kind of relief, and one very different from that which was asked for. As the defendants admitted facts which entitled the plaintiff to a full enforcement of the contract by a conveyance of the fifth tract of land, they cannot now be heard to say that their answer raised an issue as to the facts admitted, and, therefore, should have been referred to the jury. What is admitted need not be proved. But if the admission had not been made, it is perfectly manifest that the defendants would have lost in the end, as the description in the option was broad enough to take in the fifth tract with the others, entitling the plaintiff to a specific performance of the same in its entirety, and this could as well be done by an independent conveyance of the fifth tract as by a correction of the deed, so that the issue, as to the mistake, was immaterial in any view. Nor do we think that the complaint, and answer, when properly construed, raised any such issue, as it was the evident purpose of the plaintiff not to have the deed reformed, but to call for a separate deed for the fifth tract to complete the performance of the defendants' contract with him. The mistake in the deed was mentioned incidentally to indicate that the defendants' deed had fallen short of a full performance of the option.

We see no error in the judgment, and, therefore, affirm it.

Affirmed.

JOHN J. BUTLER ET AL. v. P. D. BUTLER.

(Filed 13 October, 1915.)

1. Deeds and Conveyances—Husband and Wife—Deed of Wife—Contracts—Special Probate—Interpretation of Statutes—Constitutional Law.

Revisal, section 2107, requiring that contracts made between husband and wife for a longer period than three years, and which affect or change any part of the real estate of the wife, shall be in writing, duly proved as required for conveyance of land, that the examination of the wife, separate and apart from her husband, etc., shall be taken, with the further certificate of the probate officer that it appears to his satisfaction that the wife freely executed such contract and freely consented thereto at the time of her separate examination, and that the conveyance is not unreasonable or injurious to her, is constitutional and valid, including within its terms and meaning a conveyance of lands by the wife to the husband; and therefore such conveyance without compliance with the statutory requirement that the probate officer certify that it "is not unreasonable or injurious to her" is void.

2. Same—Amended Certificate.

Where it appears that the probate officer of a conveyance of land made by the wife to the husband has omitted to certify that the conveyance was not unreasonable or injurious to her, and after the death of the wife seeks to correct the certificate by a further certificate stating that "it does appear to my satisfaction that the said conveyance is not unreasonable or injurious to her," the latter certificate speaks as of the time it was made, and it is *Held*, the second certificate was not an attempt to amend the first one by a statement of fact then existing, but a new and original certificate, which could not give vitality to the deed of the wife.

3. Deeds and Conveyances—Essentials—Delivery—Husband and Wife—Special Certificate—Interpretation of Statutes.

A deed passes no title to land unless delivered in the grantor's lifetime, and it must be complete at the time of delivery; and where a deed to lands from the wife to her husband has not been properly probated before her death under the provisions of Revisal, section 2107, the probate may not thereafter be amended so as to make the conveyance a valid one which otherwise is void.

4. Deeds and Conveyances—Husband and Wife—Special Probate—Interpretation of Statutes.

Chapter 109, Public Laws of 1911, known as the Martin Act, by express terms is made subject to the provisions of section 2107 of the Revisal, and the construction of that section, that it includes within its terms conveyances of land by the wife to the husband, making the special certificate of the probate officer necessary to the validity of such deed, is not affected by the act of 1911.

WALKER, J., concurring in result; CLARK, C. J., dissenting.

APPEAL by defendant from *Whedbee, J.*, at the March Term, 1915, of GATES.

Action to recover land. The plaintiffs are the devisees of Nancy Butler, and the defendants are the devisees of David Butler, her husband. Nancy Butler was the owner in fee of said land prior to

3 August, 1912, and on that day undertook to convey the same to her said husband, David Butler, by deed which was duly acknowledged and the private examination properly taken, except that John J. Gatling, justice of the peace, who took said probate, failed to certify that said conveyance was not unreasonable and not injurious to the wife. Both Nancy and David Butler died prior to 25 March, 1915, Nancy having died first.

When the case was called for trial, and as soon as the plaintiffs had announced their readiness, counsel for the defendant stated to the court that the controversy would depend upon the construction of a certain deed, with probate, from Nancy Butler to her husband, David Butler, and the plaintiffs' counsel agreed to that proposition. It was thereupon made to appear through counsel for the defendant that on the morning the case was called for trial the defendant, without any notice to or knowledge of the plaintiffs or their counsel, had secured from J. J. Gatling, who is still a justice of the peace in Gates County, a new certificate and had had the deed with this new certificate reregistered in Book No. 68, page..., in the register of deeds' office of Gates County. The new certificate and probate are as follows:

CERTIFICATE OF JOHN J. GATLING.

NORTH CAROLINA—Gates County.

I, John J. Gatling, a justice of the peace for the said county, hereby certify that Nancy Butler on 3 August, 1912, personally appeared before me, and duly acknowledged the execution of the foregoing deed, and she, the said Nancy Butler, being by me privately examined, separate and part from her said husband, David Butler, touching her voluntary execution of the same, doth state that she executed the same freely and voluntarily, without fear or compulsion on the part of her said husband or any other person, and that she doth still voluntarily assent thereto.

I further certify that upon said examination, and upon a careful examination of the facts, causing the said execution, it doth appear to my satisfaction that the said Nancy Butler freely executed the said deed and freely consented thereto, at the time of her said separate examination, and that the said conveyance is not unreasonable or injurious to her, the said Nancy Butler, which said conclusion I hereby certify as having been duly and carefully made concerning all the facts surrounding the execution and cause thereof.

Witness my hand and seal, this 25 March, 1915.

(Seal) JOHN J. GATLING,
Justice of the Peace.

The court held as matter of law that the deed as first certified, probated and recorded was void and passed no title. The defendant ex-

cepted. The court further held, under the facts as stated, the deed with the new certificate and probate passed no title. Defendant excepted. The court rendered judgment in favor of the plaintiffs, to which defendant excepted and appealed.

Smith & Banks and Ehringhaus & Small for plaintiffs.
A. P. Godwin and Ward & Grimes for defendants.

ALLEN, J. It is provided by section 2107 of the Revisal that "no contract between a husband and wife made during coverture shall be valid to affect or change any part of the real estate of the wife or the accruing income thereof for a longer time than three years next ensuing the making of such contract, . . . unless such contract shall be in writing and be duly proved as is required for conveyances of land; and upon the examination of the wife, separate and apart from her husband, as is now or may hereafter be required by law in the probate of deeds of *femes covert*, it shall appear to the satisfaction of such officer that the wife freely executed such contract and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her."

This statute has been held to be constitutional in *Sims v. Ray*, 96 N. C., 87; *Long v. Rankin*, 108 N. C., 337; *Kearney v. Vann*, 154 N. C., 319, and at the last term the deed of a wife to her husband, duly acknowledged and with private examination properly certified, was held invalid in *Singleton v. Cherry*, 168 N. C., 402, by the unanimous opinion of the Court, because of the fact that the officer taking the probate failed to certify that the making of the deed was not unreasonable and not injurious to the wife.

The Court said in the first of these cases: "It will be seen from a glance at the deed from Mary Ray to the defendant (her husband) that the requirements of the statute have not been observed. There is no finding that the execution of the deed is not unreasonable or injurious to the wife, and no conclusion in relation thereto certified by the officer. Our conclusion is that the deed from Mary Ray to the defendant is not valid"; in the second, "Ordinarily, where a conveyance of a *feme covert* is alleged, it will be presumed, upon demurrer, that it is valid and effective, but where a conveyance by the wife to the husband is made the basis upon which equitable relief is asked, the rule is different, on account of her general legal incapacity to make such a conveyance (*Sims v. Ray*, 96 N. C., 87), and it is therefore necessary that it should affirmatively appear, in a case like the present, that the provisions of the Code, secs. 1835 and 1836 (now Rev., sec. 2107), have been strictly complied with," and in the last, "The other deed of Cornelia Cherry to her husband, under which the defendants claim, has the ordi-

nary privy examination in due form, but the provisions of Revisal, section 2107, have not been complied with. This section requires certain findings and conclusions of the probate officer to be made with reference to contracts between the wife and husband in relation to her separate property. While the act of 1911, chapter 109, known as the Martin Act, provides that a married woman may contract and deal so as to affect her real and personal property as if she were a *feme sole,* it excepts contracts between herself and her huband. We are of opinion that in a conveyance of the landed estate of a wife by herself to her husband, the requirements of section 2107 must be observed."

The earliest of these decisions was written in 1887, and the latest six months ago, and they cannot be said to be the utterances of judges who belonged to a ruder age and who believed in the incompetence of woman.

Rather let it be said that these judges, recognizing the gentler qualities of woman, and knowing how she may be influenced to her own hurt when her affections are enlisted, have determined to give force and vitality to a statute designed, not for her enslavement, but for her protection.

These cases also hold that deeds are embraced in the term "contracts" used in section 2107 of the Revisal, but it ought not to require citation of authority to show that a deed is an executory contract until delivered, and that after delivery it becomes an executed contract.

The case of *Rea v. Rea,* 156 N. C., 526, has never been an authority for the position that the section of the Revisal (2107) does not include deeds, because there were two dissenting judges, and *Associate Justice Walker,* who concurred in the judgment, did so upon the distinct ground that the subject-matter of the action was a gift of personalty, and therefore not a contract, and he clearly recognized the application of the statute to deeds from the wife to the husband.

That this is the correct view of the case is put beyond question by the decision in *Singleton v. Cherry, supra,* where the Court said, all the members agreeing thereto: "It is a mistake to suppose that the case of *Rea v. Rea,* 156 N. C., 530, relied upon by the defendant, applies to the facts of this case, or is any authority that, in the conveyance of real property by the wife to the husband, the provisions of the statute, Revisal, 2107, are dispensed with."

The Martin Act, chapter 109, Public Laws of 1911, has no bearing upon the question before us, because it is written in the face of the act that it is subject "to the provisions of section 2107 of the Revisal," and this is also held in the *Singleton case,* in which the Court said, speaking of a deed from wife to husband: "We do not think that the Martin Act intended, in such a transaction between the husband and

wife, that the safeguards provided by the statute for the protection of married women should be set aside."

It would seem, therefore, that the validity of the statute as a constitutional exercise of legislative power and its application to deeds cannot be further questioned, and if valid, the paper-writing relied on by the defendants as a conveyance, standing alone on the certificate of probate of 1912, has no legal effect, as there is no finding by the officer purporting to take the probate that the conveyance is not unreasonable and not injurious to the wife.

The learned counsel for the defendant concede this to be true, but insist that the certificate of 1915 complies fully with the statute, and that it cures the defect in the certificate of 1912.

There is much conflict of authority as to the power of a judicial officer to amend his certificate of probate after the instrument he is probating has passed from his hands, but it seems that the weight of authority is against the exercise of the power. (1 Devlin on Deeds, sec. 539 *et seq.*) and all agree that it is a power fraught with many dangers. The higher judicial tribunals are not permitted to correct their records without notice to the parties and without an opportunity to be heard, and if the position of the defendant can be maintained, a justice of the peace, who has no fixed place for the performance of his official duties, may at any time, and when parties cannot be heard, change his certificate of probate and materially affect the titles to property.

Counsel for plaintiff and defendant in this case bear testimony to the high character of the justice of the peace who made the certificate of 1912 and 1915, but we are dealing with a principle that affects all judicial acts relating to probates, and not with his acts alone. If, therefore, we were inclined to admit that the power exists, we would not recognize it except when it is made clearly to appear that the later certificate was merely reducing to writing in the form of a certificate his official acts done at the time of the completion of the first certificate, and this does not appear from the certificate of 1915.

On the contrary, he does not confine his certificate and adjudication to the examination of the wife separate and apart from her husband, as required by the statute, but he relies also upon an examination of all the facts surrounding the execution of the deed, without stating that he ascertained these facts in 1912, and concludes that "it doth appear to my satisfaction that the said conveyance is not unreasonable or injurious to her." When does this appear and when does he conclude that the conveyance is not unreasonable or not injurious? The language deals with the present and not with the past, and the natural construction is that he reached this conclusion at the time of making his certificate on 25 March, 1915. If not, why was not this included in the certificate of 1912? The remainder of the certificate of that date is in regular

form, and gives evidence of the acts of an official of some experience, and if he then knew that it was necessary to adjudicate that the conveyance was not unreasonable, and not injurious to the wife, and he did so adjudicate at that time, he would have included it in his certificate.

We therefore conclude that the certificate of 1915 is not an attempt to amend the certificate of 1912, and that it is a new and original certificate, and as such it can give no force and vitality to the deed because, if otherwise valid, both the grantor and the grantee were then dead. *Neal v. Nelson,* 117 N. C., 406; *Thompson v. Lumber Co.,* 168 N. C., 229.

A deed passes no title unless delivered in the lifetime of the grantor (1 Devlin on Deeds, sec. 260), and it must be complete at the time of delivery. 1 Devlin on Deeds, sec. 310; *McKee v. Hicks,* 13 N. C., 379.

Affirmed.

WALKER, J., concurring in result: My opinion is that the second certificate does, by fair implication, state that all the information upon which the justice proceeded in making it was acquired by him upon the privy examination of the wife. He does not say, nor does he use any language which, if properly construed, implies as much, that he was certifying as to the facts which he learned outside said examination. The mere added expression, "and upon a careful examination of the facts," following the words, "I further certify that upon said examination," plainly mean the facts disclosed by such examination, unless we extend the meaning beyond what the words will justify. If we say that we have examined the record in a case, "and upon a careful examination of the facts," which is not an unusual expression with us, we always mean the facts as shown in the record.

There is nothing there to indicate that we searched outside the record for other facts, and nothing here that implies that the justice gathered facts not appearing at the examination of the woman. But while I hold this view as to the meaning of the certificate, nevertheless, after careful and deliberate examination of the law, my conclusion is that the justice had no authority to change his certificate. The trend of opinion as stated by the text-writers, and in a large majority of the cases, is steadily set against the exercise of any such power, as being both unusual in practice and pernicious in its consequences. The rule is well stated in *Elliott v. Lessee of Peirsol,* 1 Peters (U. S.), 328 (7 L. Ed., 164): "Had the clerk authority to alter the record of his certificate of the acknowledgment of the deed at any time after the record was made? We are of the opinion he had not. We think he acted ministerially, and not judicially, in the matter. Until his certificate of the acknowledgment of Elliott and wife was recorded, it was, in its nature, but an act *in pais,* and alterable at the pleasure of the officer.

But the authority of the clerk to make and record a certificate of the acknowledgment of the deed was *functus officio* as soon as the record was made. By the exertion of his authority, the authority itself became exhausted. The act had become matter of record, fixed, permanent, and unalterable; and the remaining powers and duty of the clerk were only to keep and preserve the record safely. If a clerk may, after a deed, together with the acknowledgment or probate thereof, have been committed to record, under color of amendment, add anything to the record of the acknowledgment, we can see no just reason why he may not also subtract from it. The doctrine that a clerk may at any time, without limitation, alter the record of the acknowledgment of a deed made in his office would be, in practice, of very dangerous consequence to the land titles of the county, and cannot receive the sanction of this Court." The cases to the same effect are numerous. *Durham v. Stephenson*, 41 Fla., 112; *Bours v. Zachariah*, 11 Calif., 281; *Merritt v. Yates*, 71 Ill., 636; *Bank v. Paul*, 75 Va., 594 (40 Am. Rep., 740); *Newman v. Samuels*, 17 Iowa, 528; *Elwood v. Klock*, 13 Barbour (N. Y.), 50; *Wedel v. Herman*, 59 Calif, 507. There is a valuable note to the case of *Jordan v. Corey* (2 Ind. 385), in 52 Am. Dec. (Extra Anno.), at pp. 519, 520, 521, which was written by *Judge Freeman*, and where he says: "Whether the act of the officer who takes an acknowledgment be regarded as a judicial or a ministerial one, there seems to be no good reason why he should not be allowed, within reasonable limits, to amend his certificate so as to make it speak the truth and conform to the actual fact. The power to amend is freely exercised in many analogous caes, and it is not easy to see why it should be permitted in this. Be this as it may, it must be admitted that the greater weight of authority is on the other side of the question." He then collects the cases and shows that the decided weight of authority is the other way, notwithstanding his own view of the subject. By reference to 1 Am. and Eng. Enc. (2 Ed.), at pp. 552, 553, and notes, it will be found that the case of *Jordan v. Corey*, on which the contrary doctrine seems to rest, has been disapproved by the other courts as being wholly unsupported by reason, or by precedents elsewhere.

A similar decision to that of *Jordan v. Corey* was made in Missouri (*Wannall v. Kem*, 51 Mo., 150), but was afterwards disapproved and overruled by the same Court in *Gilbraith v. Gallivan*, 78 Mo., 456, and also unfavorably considered in *Griffith v. Venters*, 91 Ala., 366 (24 Am. St. Rep., 918).

The justice or notary has been allowed by some courts to amend, or rather *perfect*, which is a better word, his certificate by signing his name, which he had omitted to do, or by affixing his official seal, where it had not been done at the time of making his certificate. *Harmon v. Magee*, 57 Miss., 415. But it will be seen that this is merely a formal

defect and did not contradict or otherwise substantially affect the body of the certificate. It was merely something necessary to complete the act of certification, and its omission was manifestly an inadvertence. We permitted a similar act to be done by an officer in the probate of a deed in *Sellers v. Sellers,* 98 N. C., 13. It may be that if no certificate had been made at all, or an incomplete one, that is, one lacking in some essential formality, but not affecting the substance or facts certified or their legal significance, the officer might supply what is missing. This, though, is not our case.

We know that, anciently, such acknowledgments of married women could only be taken in open court and entered on its records in proceedings somewhat tedious, intricate, and attended with much expense, form and ceremony, by the procedure of fine and recovery, this being one of the methods of barring the wife's dower. 2 Lewis's Blackstone, page 136. And by our statute the privy examination, duly taken according to the statute and by the proper officer, once had the conclusive force and effect of a fine and common recovery. Rev. Stat., ch. 37, sec. 9; *Jones v. Cohen,* 82 N. C., 75; *Ware v. Nesbit,* 94 N. C., 664, and though the law has been somewhat modified in this respect, the private examination of the wife still is binding upon her, and will pass her dower or other interest in the land described in her deed, if regularly acknowledged by her husband and herself with her proper privy examination. Rev. Code, ch. 37, sec. 8; Revisal of 1905, sec. 952, and such privy examination, even at the present, precludes investigation as to fraud, duress or undue influence in the treaty against an innocent purchaser for value; and also shuts off inquiry into fraud or falsity in the examination itself, unless supported by strong, clear, and convincing proof. Revisal, sec. 956; *Lumber Co. v. Leonard,* 145 N. C., 339.

It was a long time before the Legislature would dispense with the old procedure, and substitute one less formal and solemn, but it finally did so, and now justices of the peace and other enumerated officers have been intrusted with this important duty and power to take and certify such acknowledgments and privy examinations, and when it is done in conformity with the statute the act is clothed with the same force and effect formerly produced by the judgment of a court of record, but it was not intended by this radical change in ceremony that the proceeding, which is now authorized, should be regarded as of less moment than anciently, or that it should be left to the loose and uncertain action or conduct of careless or unskillful persons.

The formalities of the law should be just as punctiliously observed now as before the change, and I do not see why, when the officer has acted and recorded what he has done, he should be permitted to reopen the matter and alter the facts, or impart new life or validity to the record he has made, if imperfect, without the consent of the parties,

or why the court should require him to do so without notice and opportunity to be heard being given to all parties concerned. If his certificate is not technically to be considered as a judicial record, it is, at least, a *quasi* one. It was said in *Bours v. Zachariah,* 11 Calif., 281, 70 Am. Dec., 779: "The certificate of a notary public to a deed is not an act *in pais,* which he may exercise by virtue of his office at any time while in office; he derives his power from the statute, acts under a special commission for that particular case, and after taking the acknowledgment and making and delivering the return, his functions cease, and he is discharged from all further authority, and cannot alter or amend his certificate. *Mr. Justice Baldwin,* who delivered the opinion in that case, thus referred to the principal case: 'We do not deem it necessary to criticise the case of *Jordan v. Corey* in 2 Carter's Indiana Reports. That case we think wholly unsupported by authority.'" And in *Enterprise Transit Co. v. Sheedy,* 103 Pa. St., 492 (49 Am. Dec., 130), it was held: "This attempt to impart life to a void instrument has the merit of novelty. When Mrs. Sheedy affixed her name to the written instrument and acknowledged it, the acknowledgment was confessedly so defective as not to bind her or pass her title to the land. It was then delivered, and eleven days thereafter recorded. More than five months after the acknowledgment was actually taken, and the certificate thereof, signed by the notary public, indorsed thereon, he wrote and signed a second certificate of acknowledgment. The parties to the instrument did not again come before him, but he certifies what occurred months before. To this last certificate he adds facts not contained in his former certificate, with a view and for the purpose of making valid the writing of a married woman which was then invalid. Effect cannot be given to this latter action of the notary public." Citing many cases. See, also, *McMullen v. Eagan,* 21 W. Va., 233.

The doctrine is strongly stated in *Merritt v. Yates,* 71 Ill., at p. 639: "But we are aware of no statute or common-law practice which authorizes, or in any manner sanctions, the right of justices of the peace to amend their records after they have once been made. To allow a justice to make alterations and changes in his record at will and according to his whim would be fraught with evil and wrong that would be oppressive. Such a power has not been intrusted to the higher courts, and cannot be exercised by these inferior jurisdictions."

It may be admitted that whenever substance is found in a certificate of acknowledgment, obvious clerical errors and all technical omissions and effects will be disregarded, and, in order to uphold it, the certificate will be read in connection with the instrument, and in the light of the surrounding circumstances (*Morse v. Hewett,* 28 Mich., 481; *King v. Merritt,* 67 Mich., 194), a proposition in support of which numerous authorities are collected in the case last cited, but that is very far from

saying that a probate officer may alter his certificate in matters of substance affecting the validity of his action in the premises. It is true that it is said by *Judge Mitchell* so recently as 1889, in *Westhafer v. Patterson,* 120 Ind., 459 (16 Am. St. Rep., 330), that "assuming that the officer before whom the deed was acknowledged did his duty, and examined the wife separate and apart from her husband, it would follow that the informality in the certificate was the result of a mere clerical omission, which might be corrected on proper application." But a close examination of the case will disclose that the Court was referring in that connection to a mere informality.

We may well refer to what is aptly said in *Gilbraith v. Gallivan,* 78 Mo., at p. 455, after stating the fact that a perfect certificate was substituted for the original, which was erased: "If we assume this last certificate as true, and stating the facts as they occurred, it is plain that the notary, at the date of his examination and certificate, was perfectly aware of what was required by the statute." This being so, it shows the danger in allowing the probate officer to trust to his memory of the events or facts long after the examination was taken, rather than require that what he has certified or recorded when the facts were fresh in his mind shall stand, unless altered, at least, after full investigation, upon notice to the interested parties. My conclusion, therefore, is that it is safer to deny to the officer this power of correction, so as to change the substance of the certificate, upon the grounds:

1. That it would be against a sound public policy to thus open the door to collusion and fraud, or to leave the matter to the uncertain and often unreliable memory of an officer, or to his unrestrained discretion, to materially change the substance of the certificate, either for the purpose of validating or invalidating the deed.

2. It would violate the cardinal principle or maxim of the law, that a party is entitled to a notice, and a hearing before his rights are altered to his prejudice. It should, therefore, be entrusted to the court, where an investigation of an adjudication upon the facts can be made, after notice and an opportunity for a hearing, rather than to the arbitrary will or even judgment of the officer who took the acknowledgment and conducted the privy examination.

If we should permit the justice, or other probate officer, to change the facts recited in the certificate at his will, however honestly he may act, titles to land would rest, in many cases, not upon the recorded evidence of them, or upon any sure foundation, but would depend, in many instances, upon the future and uncertain action of the officer, either to validate or invalidate them, rendering them very precarious. This would shake the confidence of the people in land titles and might prove

to be very disastrous. In this case, the only witness who could contradict the officer as to the facts is dead, and it, therefore, furnishes a striking example of the unwisdom of any such rule as will permit him to change the facts stated in his certificate, attached to the deed, after the delivery to the grantee.

I may add that in this particular case it appears that there was no actual misstatement of the fact as to what the justice really did, or, at least, that there is no suggestion of such a thing or of any fraud or collusion. But the question is not what the fact is, in the instant case, but what is the law, as applicable to all cases, the object of which is to guard against any wrong influences calculated to prevent or pervert justice, or to take away a person's rights without a hearing.

Some of the cases hold that a court of equity will not correct a mistake of this kind, but that the court, after such facts have been ascertained by judicial investigation, as will justify it, may require the officer to do so by its mandatory process. But this question is not now before us.

I fully concur in the position taken by the Court in its opinion, that this transaction is subject to the provisions of Revisal, sec. 2107, and the case has been discussed by me upon this hypothesis. A deed from the wife to her husband for her land is certainly a contract which "affects or changes her estate," within the meaning of that section.

CLARK, C. J., dissenting: The deed in question was signed by Nancy Butler, the owner in fee of the land, and her acknowledgment and privy examination were duly taken. Later the justice of the peace finding that he had omitted to certify, as he mistakenly thought Rev., 2107, required, that "the conveyance was not unreasonable or injurious to her," amended his certificate to embrace such finding before any rights had accrued to purchasers or others for valuble consideration. This finding was necessarily based on the original examination, for Mrs. Butler was dead when the amendment was made.

It would seem that this should cure any defect, if there had been any. It is common knowledge that, especially prior to the passage of the Connor Act, as to a large number of deeds, there were defects in the privy examination or acknowledgment which were cured in this way. This was consonant with justice, and if called in question, even now, would shake many titles unless protected by the lapse of time.

But for a far stronger reason this title is valid. The belief held by men in a ruder age of the incompetence of women, and especially of married women, leading in the growing enlightenment of a politer and juster age, to sharp differences, the matter was settled in this State, as it has been in all others, by constitutional or statutory measures. In our State the Constitution of 1868, Art. X, sec. 6, provides:

"The real and personal property of any female in this State, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed and, *with the written assent of her husband, conveyed by her as if she were unmarried.*"

It cannot be questioned that if Mrs. Butler had been single at the time of this conveyance to the man who was her husband, the deed would have been valid. This conveyance, therefore, must be valid, when made to the same man, for she had a constitutional right to "convey it as if unmarried." The devise of it thereafter by her husband was his written assent in the most formal manner.

We are citd to *Kearney v. Vann,* 154 N. C., 311, in which it was held by a divided Court that the amendment to Rev., 2016, which gave a lien on the property of a married woman for buildings, or repairs thereto, put on her land, with her consent or procurement, because she should (said the act) be "deemed to have contracted for such improvement," should not be such lien where she contracted with her husband to make such repairs and a material man had furnished the material through him. This amendment had been passed to change the ruling which had been made in *Weir v. Page,* 109 N. C., 220, and like cases. The decision in *Kearney v. Vann, supra,* materially restricted the effect of the amendment, but it was put upon the ground that it should be read in connection with section 2107, which restricted the right of a married woman to *contract* with her husband, without the certificate of a justice of the peace. That decision, therefore, dealt solely with *contracts* between husband and wife, and not with reference to conveyances, which are not mentioned in section 2107.

In *Rea v. Rea,* 156 N. C., 529, we have a thoroughly considered opinion (for two judges dissented), which held (pp. 531 and 532) that Rev., 2107, applied, as its terms expressly state, to *contracts* only, and not to conveyances, and that a gift to her husband by a married woman (if there is no fraud or duress) is valid. It would have been in violation of the Constitution to require for a deed by a married woman more than the constitutional "written assent of her husband," and the statute (Rev., 2107) does not require it. Besides, if it applied to conveyances, it would forbid all gifts by wives to husbands, for no justice could certify that such diminution of the wife's estate was "for her advantage." There is no statute forbidding a gift by the husband to the wife.

The objection to this deed cannot be sustained, for two reasons: Because the statute (Rev., 2107) does not require any certificate by the justice that the deed is for her benefit, and it would be contrary to the

Constitution if it did. That section applies only to *contracts*, and does not refer to *conveyances*. Every lawyer and, indeed, every man, whether lawyer or not, is presumed to understand that there is a wide distinction between contracts and conveyances. The object of the statute was to prohibit married women from assuming liability for their husbands, but we are not to presume that the Legislature intended to violate the Constitution by putting an inhibition upon their conveyances, when it does not use the word. The provision in the Martin Act, ch. 109, Laws 1911, authorizes married women to contract and deal so as to affect their real and personal property in the same manner and with the same effect as if they were unmarried. In *Council v. Pridgen*, 153 N. C., 443, the Court held that the Martin Act applied to contracts and not to conveyances. It is true, it still requires her privy examination, but if that provision is deemed valid, it is to be noted that the exception is only as to the privy examination, and the Martin Act does not purport to amend the Constitution by adding to it this additional requirement of the opinion of a justice of the peace.

This whole matter was thoroughly gone into in *Rea v. Rea*, 156 N. C., 530, which was fully considered by the Court, for each judge expressed his opinion.

The opinion in chief says: "If Rev., 2107, had included conveyances . . . it would have been invalid as to conveyances of realty, because requiring the assent of a third person over and above the 'written assent of the husband,' which is the only requirement of the Constitution, and an addition to the privy examination required by statute, which has been held a mere regulation and not a restriction upon the right of the woman to convey." It may be added here that this last proposition has often been dissented from as a violation of the Constitution, and was here only quoted as having been held. The opinion in *Rea v. Rea, supra*, further goes on: "In this case the husband actually witnessed the transfer in writing, which, under the authority of *Jennings v. Hinton*, 126 N. C., 51, is a sufficient compliance with the requirement of the written assent of the husband to conveyance of realty." Here the subsequent devise by the husband is certainly such written assent.

The opinion in *Rea v. Rea, supra*, further says: "In this case there does not appear to have been any consideration, and the assignment was not only a conveyance, but a gift. No magistrate could certify that a gift by a woman to her husband is for her benefit, or does not diminish her estate. It would be a startling proposition that a married woman who, by our Constitution, has as full control of her property as if unmarried, cannot make a present to her husband if she sees fit." This opinion, on pp. 531 and 532, fully discusses the proposition that Rev., 2107, applies only to *contracts* and not to conveyances, and that opinion was the opinion of the Court.

In *Rea v. Rea, Walker, J.,* concurring, says (p. 535), summing up the rights of a married woman:

"1. She may will her property without the consent of her husband, as if she was a *feme sole.* . . . 2. She may convey her real property, with the written consent of her husband *evidenced* by her privy examination. 3. She may dispose of her personal property by gift or otherwise without the assent of her husband, as if she were unmarried. *Vann v. Edwards,* 135 N. C., 661; Laws 1911, ch. 109. 4. By virtue of the Martin Act, Laws 1911, ch. 109, she may now contract and deal so as to affect her real or personal property in the same manner and with the same effect as if she were unmarried, unless the *contract* belongs to the class of those described in Rev., sec. 2107, or unless it is a conveyance of real property, when the formality is required by the existing law, for its validity must be observed. Those two cases being expressly excepted in the act of 1911."

By reference to said Rev., 2107, it will be seen that it refers only to *contracts,* and reference to Martin's Act shows no reference to conveyances, except that conveyances by a married woman must be "with the written assent of the husband," and the only "formality" named is the privy examination. There is no attempted extension of Rev., 2107, to conveyances.

Rev., 2107, comes under subhead 3, entitled *"Contracts* between husband and wife," and provides: "No *contract* between a husband and wife during coverture shall be valid to affect or charge any part of the real estate of the wife or the accruing income thereof for longer time than 3 years next ensuing the making of such *contract,* or to impair or charge the body or capital of the personal estate of the wife or of the accruing income thereof for a longer time than 3 years next ensuing the making of such *contract,* unless such *contract* shall be in writing, and be duly proved as is required for conveyances of land; and upon the examination of the wife, separate and apart from her husband, as is now or hereafter may be required by law in the probate of deeds of *femes covert,* it shall appear to the satisfaction of such officer that the wife freely executed such *contract,* and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her. The certificate of the officer shall state his conclusions, and it shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be." *Rea v. Rea, supra,* after setting out the above section in full, says: "An examination of section 2107 shows that it applies solely to contracts, and not to conveyances; indeed, the word *'contract'* is used 5 times in that section, besides in the heading. The object of the Legislature was clearly to prevent the wife making any contract with her husband

whereby she should incur liability against her estate which in future might prove a burden or charge upon it, or cause a charge upon or impairment of her income or personalty. To that end not only a privy examination was required, but the certificate of the magistrate that the contract was not unreasonable or injurious to her. This provision does not attempt to add as to conveyances by her, as to which the act of 1911 retains the constitutional restrictions in regard to realty, that there must be the written assent of the husband and statutory privy examination, any further restriction, such as the approval of a third person." Adding that if it did it would be unconstitutional.

Laws 1911, ch. 109 (the Martin Act), provides: "Subject to the provisions of Rev., 2107, every married woman shall be authorized to contract and deal so as to affect her real and personal property in the same manner and to the same effect as if she were unmarried; but no conveyance of real estate shall be valid unless made with the written assent of her husband, as provided by section 6, Article X of the Constitution, and a privy examination as to the execution of the same, taken and certified as required by law." *Rea v. Rea, supra* (p. 531), after quoting the above, says: "This recognizes that section 2107 applies to contracts, and that the only restriction upon conveyances by a married woman is the constitutional one, requiring the written assent of her husband."

In *Rea v. Rea, supra, Brown, J.,* says, p. 536: "By the Martin Act (introduced by Senator J. C. Martin in the General Assembly of 1911) the wives have been emancipated and are placed on an equal footing with their single sisters, except that in order to convey their real estate they must still have the written consent of their husbands." Nothing is said by him as to supervisory judgment of a justice protecting the incompetence of wives from the presumed fraud or duress of husbands.

Laying aside preconceived opinions and taking the law as it has been really and plainly and unmistakably written in the Constitution and the statutes, we find that the Constitution guaranteed to married women the absolute right to convey with no other restriction than the written assent of their husbands.

We find also that Rev., 2107, which requires a justice of the peace, in the great wisdom of that officer, to supervise the contracts of married women with their husbands, does not attempt to violate the Constitution by adding restrictions to their freedom in making conveyances, but by its terms applies only to contracts by them, and is intended to protect them from incurring liabilities for the debts of their husbands. *Rea v. Rea,* 156 N. C., p. 531.

By reference to the Martin Act, ch. 109, Laws 1911, we find that by it married women were given full liberty to *contract,* except with their

husbands under 2107, as if unmarried, but restricted their conveyances with the written assent of the husband by adding only that there must be a privy examination.

We are cited, however, to *Singleton v. Cherry,* 168 N. C., 402, as an opinion without any dissent. A very great lawyer said that he paid "less attention to an opinion where there was no dissent than when there was, because the former was more likely to be an inadvertence, or not fully considered." But whether that is a witticism or a truism, an opinion, whether unanimous or inadvertent, cannot stand when it is contrary to the Constitution, by requiring restrictions on conveyances which were abolished by the Constitution, and the opinion is based solely upon a statute which refers only to contracts.

It may be repetition, but it is none the less true, that the Constitution having guaranteed to married women the right to convey merely "with the written assent of the husband," the requirement of a privy examination is adding a restriction in violation thereof. It is a survival of antiquated ideas as to the thorough incompetence of married women which the Constitutions of this and all other States have now repudiated. To require the privy examination since the Constitution of 1868 is to go back to the exact requirement for conveyances by married women prior to the Constitution. The former statute is brought forward, it is true, in the Revisal, but even treating the constitutional provision as of no more vigor than the legislative enactment, in such cases the later law governs.

The Constitutional Convention was not inadvertent to the fact that they were abolishing the privy examination, for to require it would have made useless the right to convey "with the husband's assent," and the Constitution requires the privy examination as to the wife's joinder in a conveyance of the husband's homestead, after it is allotted, thus permitting it in that case only. It may be added that North Carolina is one of only five States that still require the privy examination, and in none other of those is the Constitution as explicit in freeing women from the shackles of the common law as to their conveyances as is our Constitution. However, in this case the privy examination was duly taken.

In conclusion—the Constitution forbids any restriction upon the absolute freedom of married women in disposing of their property by will or deed, save that in conveyances of realty there must be the written assent of the husband.

No statute imposes any restriction on conveyances by married women over and above such written assent, except the privy examination, already discussed. Rev., 2107, is expressly limited to *contracts,* and does not mention conveyances.

The Martin Act, Laws 1911, ch. 109, frees married women from restrictions as to *contracts*, except with the husband, which it retains, as set out in Rev., 2107, and it has a proviso retaining (unconstitutionally, as I believe) the requirement of a privy examination—but nothing more. Anything beyond the above provisions of the Constitution and the statute is of judicial origin and in accordance with preconceived opinions, for which there is no foundation in the statute, and is forbidden by the clear, unmistakable language of the Constitution.

The status of the inferiority of women was not created by statute, but by judicial decision of ancient judges in England, who were thoroughly steeped in that belief, and especially of the incompetence and incapacity for control of property by those women who were so ill-advised as to marry—whom, indeed, the judges held to be the chattels of their husbands. This has long ago been corrected by statute in England, which recognizes the full right of women, whether married or single, to the absolute control of their own property. For 40 years there has been no privy examination required of a married woman in England, and in very few of our sister States do they retain the requirement of our Constitution that the husband shall give his written assent to his wife's conveyance. With that single restriction our Constitution of 1868 recognized the full property rights of married women, and we should accept the view of their rights and capacity now so plainly recognized and written in our Constitution and laws.

When a statute can be construed in a way that reconciles it with the Constitution, this should be done. Rev., 2107, by its terms, six times repeated therein, applies to *contracts*, and in that light no one can question its constitutionality, whatever criticism there may be of the implied presumption of incapacity on the part of wives and of duress or fraud on the part of husbands; for, otherwise, the presumption would be, as in other contracts between persons *sui juris*, of the validity of contracts unless incapacity or fraud or duress are shown. If the statute, Rev., 2107, had attempted to go further, and had added to the "written assent of the husband," which the Constitution fixes as the sole restriction upon the *jus disponendi* in the conveyance by a married woman of her realty, the requirement that some justice of the peace should weigh the trade and give his wise approval, this would repeal the constitutional provision. This the statute did not do, and it should not be so construed.

If to the sole constitutional requirement of the "written assent of the husband" there can be added the further requirement that a justice of the peace must approve the action of the wife, as to this class of deeds, this could be required as to every deed by her. If the approval of a justice of the peace (or other restriction) can be imposed as to deeds

by married women, it can be required as to wills by them, thus destroying entirely, effectively, and altogether, the freedom of the disposition of their property, real and personal, "as fully *as if unmarried,*" which was solemnly guaranteed to all married women by the Constitution, with the sole exception that as to their conveyances there should be the written assent of the husband.

If the approval of a justice of the peace or a privy examination can be added to the constitutional requirement as to deeds by married women, the same or any other restriction can be required as to wills by them.

The constitutional provision made married women *sui juris* in every respect, save that one restriction, of requiring assent of the husband to conveyances. Good faith has not been kept with the mothers and wives of North Carolina. The guarantee that they should, with such assent, convey "as if unmarried" is not kept when unmarried women can convey without the wise approval of a justice of the peace, and when a man can convey without his privy examination being taken. We are governed by preconceived opinions and the dead hand of the past, and not by the provisions of a written Constitution.

H. L. HUMPHREY ET AL. V. J. A. LANG, EXECUTOR OF W. M. LANG, ET ALS.

(Filed 13 October, 1915.)

Wills—Interpretation—Corporations—Large Dividends—Time Certificates—Income—Stock Dividends.

A devise for life of all revenue from certain corporate stock includes such dividends as may be declared after the death of the testator, though unusually large, and earned by the corporation for a long period of time antedating his death; and where the shareholders are given the privilege of taking the dividend in new stock or a time certificate of deposit, and the executor of the deceased has chosen and received the time certificate, this certificate is regarded as a dividend upon the stock, which goes to the life tenant as income therefrom.

APPEAL by plaintiffs from *Connor, J.*, at the May Term, 1915, of PITT.

Civil action to determine the rights of Annie R. Lang, the widow, and the other devisees of W. M. Lang, under item three of his will, which reads as follows:

"Third. I give and devise to my wife, Annie Lang, the horse, buggy, trap, and harness I may have on hand at my death; one milk cow, one house and lot, and furniture, situated on Main and Church streets in the town of Farmville; all revenue from the Bank of Farmville, the Bank of Greenville, and the Farmville Oil and Fertilizer Company;

the Freeman Ellis lot on the Norfolk Southern Railroad; one lot on Moore's land, and four hundred dollars in Farmville bonds."

The cause was heard at May Term, 1915, Superior Court of Pitt County, by *Connor, J.*, upon agreed facts:

The Bank of Farmville having determined to increase its capital stock, did, on 30 March, 1915, declare a dividend of a fraction over one hundred per cent, and that said dividend accruing to the stock referred to in item three of said will aggregated $2,100, the stockholders having the privilege of taking the dividend either in new stock or a time certificate of deposit. Said dividends in the form of a certificate of deposit, was paid over to the defendants as executors of W. M. Lang, and is now in their hands as executors.

The court below adjudged that the defendant Annie R. Lang was the owner absolutely of all the property mentioned in item three of the will, except the stocks in the two banks and in the fertilizer company, and as to those, she was entitled to the dividends during her life.

The court further adjudged that the $2,100 dividend, declared by the Bank of Farmville, and paid to the executors in a certificate of deposit, was revenue or income, and not principal, and that said Annie R. Lang was entitled thereto. From the judgment rendered, plaintiffs appealed.

J. L. Horton, James H. Pou for the plaintiffs.
Harding & Pierce for the defendants.

BROWN, J. The ruling of the Superior Court must be sustained. The interpretation placed upon the will is manifestly correct, and the only assignment of error we need discuss relates to the $2,100 dividend of the Bank of Farmville.

This question has been much discussed by text-writers and courts, and the weight of authority seems to be in favor of the proposition, as stated by the Supreme Court of the United States in *Gibbons v. Mahon,* 137 U. S., 559: "Ordinarily, a dividend declared in stock is to be deemed *capital,* and a dividend in *money* is to be deemed income of each share."

A stock dividend differs materially from a cash dividend. The former takes nothing from the property of the corporation and adds nothing to the interests of the shareholders. Its property is not diminished and their interests are not increased. Whereas a cash dividend declared on the then existing capital stock subtracts so much from the treasury of the corporation and transfers it to the pockets of the stockholders.

This is the view expressed by us in *Trust Co. v. Mason,* 152 N. C., 660. Accumulated earnings of a corporation remain its property until

distributed, and until then remain liable for its debts and are under its control. They do not become the property of stockholders until distributed by the corporation. When so distributed, they become the property of stockholders, and not until then.

If distributed exclusively in the form of new or additional stock, they remain as capital, but if distributed in the form of cash or its equivalent, they are regarded as income, and belong to the life tenant. This is the consensus of judicial opinion in England, as well as in the United States.

In *Paris v. Paris,* 10 Ves., 185, an extra dividend was declared by a bank from the profits of the previous years. *Lord Eldon* held that it was income, and went to the life tenant, and said it made no difference whether the dividend was in money or in stock; that the distinction in the language of his lordship was "too thin." He cites and relies upon the case of *Brander v. Brander,* 4 Ves., 800.

In *Clayton v. Gresham,* 10 Ves., 288, the same rule was adopted in respect to an extraordinary dividend of profit made by a bank among its stockholders. *Lord Erskin* adopted the same rule in *Witts v. Steere,* 13 Ves., 362, although expressing some doubt as to its correctness.

In *Barclay v. Wainwright,* 14 Ves., 66, *Lord Eldon,* after reviewing the cases, decreed to the life tenant an extra dividend declared by the bank. The same ruling was followed in *Norris v. Harrison,* 2 Madd., 279. In *Hooper v. Rosseter,* McClel., 527, *Lord Chief Baron Alexander* said that it seemed clear from all the cases, from the first to the last, that wherever a division was made clearly and distinctly as a dividend only, the life tenant was to have it.

In *Price v. Anderson,* 15 Sim., 473, an increased dividend made by an insurance company was held to be income. The *Vice Chancellor* said that as the company had declared the dividend, as a dividend, he held that it belonged to the tenant for life.

In the case of *Hopkins' Trusts,* 18 Equity Cases, L. R., 1874, a holder of shares in an insurance company bequeathed his personal estate to trustees in trust for his wife for life, the dividends and income thereof to go to her, with the remainder over. An extraordinary dividend was declared on the shares from accumulations of five years previous to his death; held that these dividends were income and belonged to the tenant for life.

In that case it was said that the testator, who was well acquainted with the value of the shares and the condition of the company, as he had held the shares for many years, when he gave to his wife the dividends and income must have intended her to have all the dividends from the same, whatever they might be.

In *Brown v. Collins,* L. R., 12 Equity, 586, it is held that dividends in a public company, earned before but declared after the testator's

death, are income and not capital. To the same effect is *Bates v. McKinley*, 31 Beaver, 280; *Jones v. Ogle*, L. R., 8 Chancery, 192; *MacLaren v. Stainton*, 27 Beaver, 460; *Preston v. Melville*, 16 Sim., 163.

In this case a large bonus on bank stock was held to belong to the life tenant. It is admitted that the company might have capitalized its profits by issuing additional shares, but having declared it as a dividend, it remained income. See, also, *Straker v. Wilson*, L. R. 6, Ch. 503; *Ibbotson v. Elam*, L. R., 1st Equity, 188.

Coming to the United States, we find that the courts of this country have very generally held with the English rule. Where the dividend is declared as a dividend, and in cash or its equivalent, it is to be regarded as income, and is not capital.

In *Minot v. Payne*, 99 Mass., 108, it is said: "A simple rule is to regard *cash* dividends, however large, as income, and *stock* dividends, however made, as capital." This rule is more in conformity with the decisions of the courts so far as the subject has been discussed. In this case many of the English cases have been cited and reviewed.

A leading cae on the subject is *Richardson v. Richardson*, 46 American Reports, 430. In this case the Supreme Court of Maine says: "The decided preponderance of authority probably concedes the point that dividends of stock go to the capital, under all ordinary circumstances. But we are well convinced that the general rule deducible from the latest and wisest decisions declares all money dividends to be profits and income, belonging to the life tenant, including not only the usual annual dividend, but all extra dividends or bonuses payable in cash from the earnings of the company. We are satisfied that this can be the only safe, sound, just and practicable rule, and that any attempt to engraft refined and nice distinctions upon such rule will be productive of much more evil than any good that can come from it."

In that case it is adjudged that the life tenant be entitled to the dividend, "irrespective of its source, amount, or the length of time in which it was earned." To the same effect is *Millen v. Guerrand*, 67 Ga., 284; *Rand v. Hubbel*, 115 Mass., 461.

In *DeKoven v. DeKoven*, 205 Ill., 309, it is held that money earned by a corporation during a stockholder's lifetime, but not distributed as dividends until after his death, is income, and goes to the life tenant under his will, and not to a remainderman, although the dividend amounts to 20 per cent of the face value of the stock.

In *Gilkie v. Payne*, 80 Me., 319, the case of *Richardson v. Richardson*, *supra*, is cited and approved and followed.

In the case of *James P. Kernochan's executors* it is held that the widow, a life tenant, was entitled to the whole of an extra dividend declared after the death of the testator, although made from net earnings

accumulated before that time; that, whenever earned, they were not profits until so declared. 104 N. Y., 619. The subject is very elaborately discussed in that case by *Mr. Justice Danforth*. See, also, *Kaufman v. Charlottesville Mills,* 93 Va., 673.

In *Greene v. Bissell,* 79 Conn., 547, it is held that cash dividends are regarded as income, passing to the life tenant, and stock dividends as capital, inuring to the remainderman. In 40 Cyc., 1880, it is said: "That the distinction between profits which have accumulated before the testator's death, but which have not been divided, and those subsequently accruing, has sometimes been discarded, it being held that all cash dividends declared from the profits go to the person entitled to the income, regardless of the time when they were earned or the size of the dividend by which they were sought to be distributed." A large number of authorities are cited in support of the text. The very same expression in almost the same words is to be found in Gardner on Wills, page 489, together with a copious citation of cases in the notes.

The fact that the dividend declared by the Bank of Farmville was payable in stock or in cash at the option of the stockholder makes no difference. The identical point is decided in *Holbrook v. Holbrook,* 74 N. H., 201, in which it is held that "An extra dividend by a corporation out of profits, which may be taken in cash or applied in payment of an increase of stock to which the stockholder is entitled to subscribe, is a cash dividend."

In the case of *Davis v. Jackson,* 152 Mass., 58, it is held that a dividend of $25 on each share of stock, with the privilege to each stockholder to take an additional share of stock for every four shares held by him instead of receiving his dividend in cash, is a cash dividend, and a dividend so declared is not a stock dividend, but must be treated as income, to which the life tenant is entitled. In the note to that case, 23 Amer. State Reports, 804, it is said by the author that the weight of authority is that dividends derived from the earnings of the company, no matter when such earnings were made, belong to the life tenant.

The fact that the dividend was declared payable in a certificate of deposit is immaterial. That is substantially a cash dividend, to be credited to the stockholder upon the books of the company, and is no longer the property of the bank.

We might, in discussing this matter, cite a great many other authorities, but we think that we have demonstrated sufficiently that the great weight of authority fully sustains the correctness of his Honor's judgment.

The judgment of the Superior Court is

Affirmed.

B. B. SUGG AND MINNIE O. SUGG v. TOWN OF GREENVILLE.

(Filed 13 October, 1915.)

1. Deeds and Conveyances—Boundaries—Trials—Questions of Law—Questions for Jury.

What is the boundary of a tract of land is a question of law in construing a conveyance thereof; but the location of the boundary is a question of fact.

2. Deeds and Conveyances—Municipal Corporations—Streets—Dedication—Acceptance.

The acceptance of land offered by the private owner thereof for street purposes is in the discretion of the proper municipal authorities, and it is necessary to be had before such dedication can become effectual and binding, though it may be either express or implied.

3. Same—Discretionary Powers—Width of Streets.

The proper municipal authorities in extending a street of a city or town are vested with the discretionary power to determine the width of the street as thus extended, and there is no requirement that the width of the street as extended shall be the same width or conform to the lateral lines of the original street, or those of its further extension.

4. Deeds and Conveyances—Descriptions—Boundaries—Ambiguity—Trials—Questions for Jury.

Where a conveyance of lands calls for the eastern line of a certain street of a town, extended through its intersection with F Street, and there is conflicting evidence as to whether the physical or actual boundary had been established and was used at the time and was a more western line than that of the theoretical extension, had it been made on a straight line through F Street, the *locus in quo* lying below the street, it raises a question for the jury to decide as to which of the two lines the parties intended when the conveyance was made, when the language of the conveyance leaves the matter in doubt.

5. Deeds and Conveyances—Interpretation—Meaningless Words.

Where a street is called for as a boundary to a tract of land conveyed, and the location of the eastern line of the street is left in doubt, and it further appears that another call in the description is for the street "extended" or thence with the street extended through its intersection with F Street, the theoretical extension of the street through F Street in a straight line on that side thereof will not necessarily control, there being evidence tending to establish a different line actually adopted and used by the municipality, and under the facts in this case it is held that the words "through its intersection with F Street" should be read as if written "to" the said intersection, as that was clearly meant.

6. Deeds and Conveyances—Interpretation—Former Deeds—References—Intent—Evidence.

Where the description in a conveyance of lands calls for one of its boundaries as a certain street, the line of which is left uncertain, and reference is made therein to a prior conveyance in the chain of title, the courts in construing the deed will consider it in its entirety, and give reasonable effect to all its parts, the circumstances surrounding the parties at the time, and other relevant matters and where the reference to the former deed sheds light upon the intention of the parties, it will be considered in interpreting the deed in question in order to ascertain this intent.

7. Municipal Corporations—Filing Claims—Unliquidated Damages—Torts—Interpretation of Statutes.

Revisal, section 1384, requiring claimants against a city or town to file their claims with the proper municipal authorities, has no application to actions *ex contractu*, where the damages are unliquidated, nor to torts.

8. Deeds and Conveyances—Actions—Grantor and Grantee—Parties.

Where a grantor and his grantee bring an action against a municipality to recover damages for the unlawful appropriation of land for street purposes, if the former has retained title to the *locus in quo* in himself, he would have the right of independent or separate action to recover it, and if otherwise, the latter may maintain an independent or separate action for it, and in either event the one would not be a necessary party to the other's action.

9. Same—Mutual Mistake—Pleadings—Amendments.

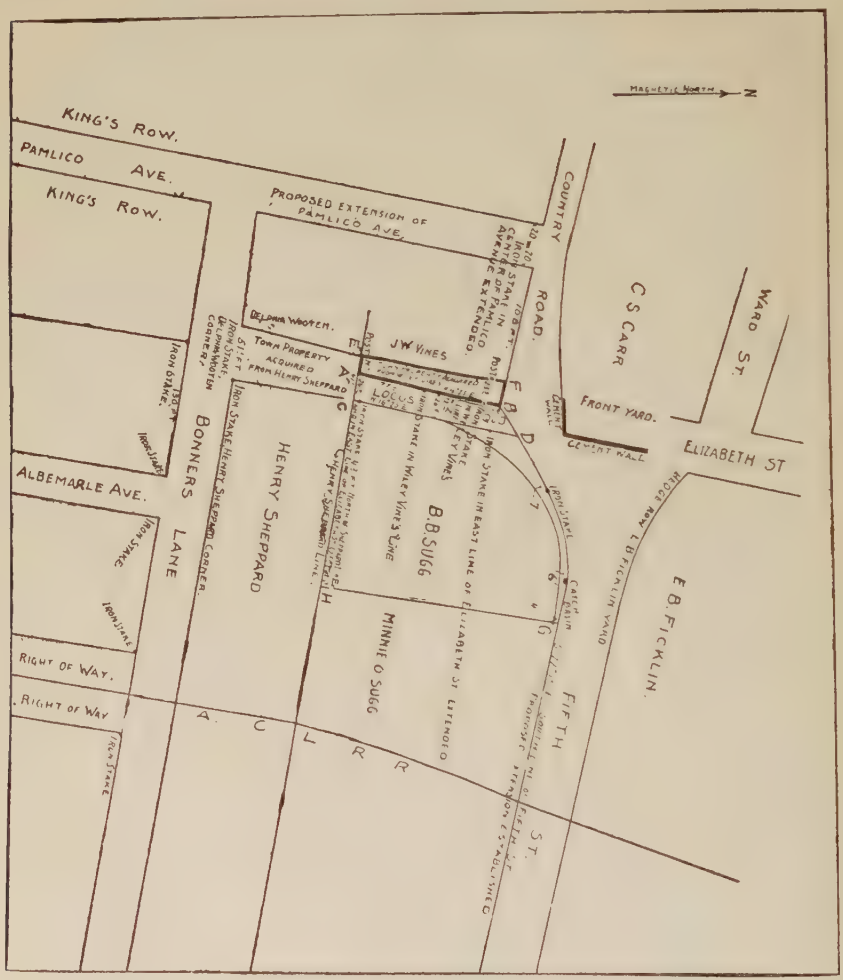
The grantor is a necessary party to the grantee's action against another to recover lands when the latter claims that the *locus in quo* was intended to be included in the conveyance to him and was omitted by mutual mistake, and asks for a correction and for a recovery of the land in that aspect; and in this case it is held that the grantee may apply for leave of the court to amend his complaint, so as to make the proper allegations of mistake so that the deed may be reformed.

APPEAL by plaintiffs from *Connor, J.*, at the April Term, 1915, of PITT.

Special proceeding, begun before the clerk for the assessment of damages for taking land to be used as a street of the town, which was appealed by defendant to the Superior Court. The deed from Minnie O. Sugg to her coplaintiff, B. B. Sugg, describes the western line of the land conveyed to the latter as "thence with Elizabeth (Street) extended, through its intersection with Fifth Street," and the question is, where is this line? The defendant contended that it meant the eastern line of Elizabeth Street, if extended the width of that street north of Fifth Street, which is 49 feet, or a theoretical extension of that street, whether actually laid out south of Fifth Street or not, and the court below seems to have taken that view. This would fix the eastern line of Elizabeth Street and the western line of plaintiff's lot below Fifth Street, at C, D, as shown on the official map, and if this be the line, the ruling was correct, and the plaintiff cannot recover.

The defendant also contends, and there was some evidence to show that the street had been actually opened to that line. The plaintiff, however, contends and offered much testimony to show that Elizabeth Street had been actually laid out by the defendant below Fifth Street, as represented by the letters A, B, E, F, on the map, and was used by the public, and fully recognized by the defendant as the only extension of Elizabeth Street south of Fifth Street, and that, as thus laid out, the western line of plaintiff's land would be at A, B, as shown on the map, or the eastern line of the Wiley Vines land, and that the call of the

deed above mentioned should be extended to that line, as it is the line intended by the parties to the deed as the western line of the land conveyed.



The jury returned the following verdict:

1. Was the plaintiff the owner of that portion of Elizabeth Street lying on the western line of his lot described in the complaint, 25 feet wide and 160 feet long, as alleged? Answer: "No."

2. If so, what damages is plaintiff entitled to recover of defendant on account of the taking of the said lot for a part of Elizabeth Street? Answer: "$500."

The court instructed the jury to answer the first issue "No," and that they would not answer the second issue. As this was the direction of a verdict, we need only set out some of the testimony favorable to the plaintiff's contention. The deed of Minnie Sugg to B. B. Sugg, dated 1 September, 1910, after describing the land conveyed, adds these words to the description, "being the westwardly portion of the lot conveyed by T. J. Jarvis, commissioner, to Minnie O. Exum (now Minnie O. Sugg). The Jarvis deed, dated September, 1894, conveys the land west of the A. C. L. R. R. (formerly Wilmington and Weldon Railroad), and "on the south side of Fifth Street and adjoining the lot of Reuben Adams, the lots of Margaret Miller and others." The deed of J. W. Vines to the town of Greenville, dated 13 January, 1904, conveys land of the following description: "Beginning at an iron stake on the south side of Fifth Street on the river road, the point at which the western line of Elizabeth Street as originally laid would intersect the line of said Vines, and runs the course of said Elizabeth Street south 14 degrees and 30 minutes west about one hundred and forty feet to Delphia Wooten's line, then with her line and the Henry Sheppard line (now owned by said town) an easterly direction to J. L. Sugg's southwestern corner, then with said Sugg's western line a northerly direction about one hundred and sixty-one feet to his northwest corner in said street or road, and then with said street or road to the beginning. Said piece or parcel of land hereby conveyed is for the continuation of Elizabeth Street." This deed recognizes the line as claimed by plaintiffs.

B. B. Sugg, one of the plaintiffs, testified:

"I am the Sugg mentioned in the deed from Minnie O. Sugg to B. B. Sugg, and I was living in Greenville at the time. It was 1 September, 1910. Minnie O. Sugg was the wife of J. L. Sugg, and J. L. Sugg was my uncle. Minnie O. Sugg prior to her marriage was Minnie O. Exum, referred to in one of the deeds introduced in evidence. At the time the deed was executed I was living on the property, a part of which I purchased at the time. When I purchased the lot from Minnie O. Sugg I knew where the Wiley Vines lot was; it was just west of the Sugg property, as indicated on the map. I saw the property indicated between 'CD' and 'AB' several times a day. At the date of my purchase of the property the land lying within the black line was opened as a part of Elizabeth Street, that is, the strip purchased by the town from Wiley Vines; it was purchased, opened, and used as the street connecting Elizabeth Street and Bonner's Lane. In driving from Fifth Street to Bonner's Lane you will partly drive over the Wiley Vines strip and partly on this side, but mostly on the Wiley Vines property which the town purchased. The strip indicated as lying between 'AB' and 'CD' was never opened or used by the public as a street, but my

uncle did drive over it before he died to reach his stables, which were in the rear of the property from Fifth Street. I never knew the town intended taking my property for a street until several months after I had purchased it, and I did not know then that they intended taking it until they had put thirty or forty hands to work out there digging it down. I protested at the time and was then asked permission by the town to be allowed to go ahead, but refused. The town purchased the property indicated on the map between lines 'AB' and 'EF' from Wiley Vines in 1904. My western line is indicated by letters 'AB.' My line is the old line between Sugg's and Wiley Vines' land, and it is evidenced by iron stakes. The Sugg line called for in the deed from Wiley Vines to the town of Greenville is my line indicated on the map by letters 'AB.' When I purchased the property, the strip the town bought from Wiley Vines was opened and used by the public. When the town hands were cutting down the property they went over on the Sheppard lot some and dug in the back of my line also. They have left an embankment in the rear of my property of six and one-half feet that it would be impossible to drive over. I gave in my property for taxation at the same as I have always given it in since I purchased it, and although I considered it damaged considerably by the town's action, I knew that I had no authority to reduce its assessed taxable valuation. I paid $1,150 for the property in 1910 and I purchased it from my aunt by marriage, with whom I was living at the time. It fronts on Fifth Street, and all property in that section of the town has certainly quadrupled in value within the last four years. Since the town has opened the street through the property purchased from Wiley Vines you can drive from Fifth Street through by Bonner's Lane to the Atlantic Coast Line depot, but it is very difficult driving. There has been passing from Fifth Street to Bonner's Lane over this property ever since the town purchased from Vines and opened the street, but my property has never been in general use by the public, and such passing was only by permission, and any use of it was only permissive. Several years ago there was a fence clear across that property and the Wiley Vines property, running from east to west, and when people passed through it had to be taken down and was often left down, which fact I remember annoyed my uncle very much. The remnants of the fence are there now. Shortly after this fence was moved Mr. Sheppard sold his lot just back of mine to the town for the purpose of opening a street. That deed calls for my line. The fence was torn down before I bought the property and there was some permissive passing that I knew of when I took the deed, but the town never undertook to take my property for public use as a street until about two and a half years ago. They had prior to this time purchased the Vines and the Sheppard lots which connect Fifth Street and Bonner's

Lane, and this was the property that the passing was supposed to be through. I do not know, of my own knowledge, what took place prior to 1909, for I only came here during that year. When I bought my property my aunt reserved a driveway back of my lot so that her wood pile in the rear of her property could be reached from Fifth Street or from Elizabeth Street extended. However, this driveway has never been used, and although the deed reserved the right of use, the property was still to be mine. If the town had not taken twenty-six feet of my property I would have enough frontage on Fifth Street for two lots, but as it is, I will not have enough frontage left there to make two lots large enough."

Wiley Vines, witness for the plaintiffs, testified:

"I own property on Fifth Street; it is located on the Tarboro road or on the south of Fifth Street west of Elizabeth Street extended. I bought the property from Mr. Oscar Hooker. I sold a strip of land to the town of Greenville, but before I sold this property I was joined on the east by the Sugg property; an old fence stood on the line between us and an old spring was in there somewhere near the line on my side. I knew where the line between us originally ran, and I put iron stakes on the line or as near to it as I could come. I showed Mr. Dresbach the stake that I set when he was up there making the survey. My deed calls for the Sugg property, and until I sold it to the town my property joined the Sugg property on the east. The deed I gave the town of Greenville calls for the Sugg line. The property I sold the town is shown on the map as enclosed in black lines. It was several years after I sold to the town before I noticed any cutting or grading on the property. I do not remember just how long. There was no street opening from Fifth Street to Bonner's Lane, but people went across there as a near cut. The spring I referred to was two or three or four feet from the line, out in the street as it now stands. The driving was on the east side of the spring; I do not know whether the driving was on Mr. Sugg's side or mine. Before the town bought my property and opened the street it was grown up in reeds and briars. There used to be an old ditch that is now filled up; it was located on my side of the line."

Lance Wooten, witness for the plaintiffs, testified:

"I live on Elizabeth Street, as it is now opened. I live up there at Delphia Wooten's. I built there in 1901 myself and I know the locality. I remember when I moved up there, 1901, there was a fence across Mr. Sugg's property. I don't know how long it remained there, but I remember sometimes when I would go in it would be down, and when I would come out it would be up. There used to be a wall on the line between Wiley Vines' property and Mr. Sugg's property, but after Wiley sold to the town I think he moved it. I have seen two iron stakes up

there; they were right behind the wall, and when the wall was moved the stakes were left there. I have not seen the stakes lately and no one has told me anything about them. I think the property was cut down by the town in 1911; it was cut right back to my house, about as deep as my house."

Jack Pitt, witness for the plaintiffs, testified:

"I have been living here about 60 years; been working there about 15 years. I used to work for Mr. Sugg and I know where the fence was between Mr. Sugg and Wiley Vines. It was right straight across from where there was a cedar behind Wiley Vines' house. There was a stump there and a wife fence. I don't know who kept up the fence, but I put it up several times for Mr. Sugg when people would leave it down. After the town bought from Wiley Vines, people drove through his side regularly. I remember where the line was; there were old posts there. He sold to the town up to the line and it made a good wide little street. The people drove over there and used it as a street after the town bought it from Wiley. I remember when they got the property graded out, but I don't know how long it has been. It was since Mr. B. B. Sugg bought."

W. C. Dresbach, witness for the plaintiffs, testified:

"The heavy black lines drawn on the map in an ell-shape just across Fifth Street from the Sugg property is the concrete wall to Mr. C. S. Carr's front yard, and it is impossible to extend Elizabeth Street to Bonner's Lane without taking in this property." Q. Has it been extended the full width? Defendant objects; sustained; plaintiffs except.

There was testimony given by the defendant's witnesses which tended to contradict that of the plaintiffs, but it need not be set out. Judgment was entered upon the verdict for the defendant and an appeal taken by the plaintiffs, after reserving their exceptions.

D. M. Clark and Harding & Pierce for plaintiffs.
F. G. James & Son and Jarvis & Wooten for defendant.

WALKER, J., after stating the case: We have often said that what is the boundary of a tract of land is a question of law, but where it is, we have as often held to be a question of fact. The call in the deed of Minnie O. Sugg to B. B. Sugg, "thence with Elizabeth extended through its intersection with Fifth Street" does not necessarily mean that the extension must be the full width of the northern or original part of the street, as there is evidence in this case, and strong evidence, too, that Elizabeth Street had been extended below Fifth Street by the town, but not the same width as above, and it is not infrequently the case that the extension of a street beyond its intersection with another street is not

of the same width as that portion of the street that is extended or lengthened, and sometimes the extension does not have lines which are coincident with or opposite to those of the other part of the same street, as offsets are sometimes to be found. But, however this may be, the deed, and the evidence taken in connection with the physical facts, show that the parties may have intended that the western line of the land conveyed to plaintiff, B. B. Sugg, should not be at CD, as shown on the map and as contended by the defendant, but at AB, as shown on the map and as contended by the plaintiff. Did the parties mean the lines of Elizabeth Street *as* theoretically or mathematically extended or *as* actually extended at the time?

The town was not bound to accept the land as a part of its street, even though the parties may have intended by the deed to have that much space open, as a dedication for the street, to await the acceptance of the town, because the town has the right to decide where its streets shall be and how long and how wide they shall be. *Kennedy v. Williams,* 87 N. C., 6. We do not think the call was so definite, precise and unambiguous as to leave no room for fair opinion as to what was meant and to exclude all construction of the deed. If it was meant by the parties to establish the line at CD, then that, in law, is the line regardless of the action of the town; but it was competent for the jury, upon all the evidence, to consider and say whether that was meant, or whether, on the contrary, the parties intended to refer only to the eastern line of Elizabeth Street below Fifth Street as actually established by the town. A reading of the deed would, at first sight, and without any knowledge of or attention to the facts, seem to favor the defendant's view; but when they consider the pertinent evidence, a very different conclusion might be reached by the jury.

There is this to be further said, that the parties may have meant Elizabeth Street *as* extended, and not merely extended with the identical lines of the original street. There is another view, of which the deed and other evidence are susceptible, and one which the jury may take, if the case is submitted to them. The line is not bound to make the street of the same width on the south as on its north side. What shall be its conformation and location is a matter committed by the law entirely to the judgment and sound discretion of the public authorities having the matter in charge, and if they have already acted, at the time a deed is made, and delineated the street, so that it has become a fixed and established highway of the town, there is no reason why the parties may not be considered to have written their deed with reference to this well known physical fact, and that, when they called for Elizabeth Street extended, they meant as *already* extended by the town, rather than that the street should be considered as theoretically extended on the same side lines as

those of the original street. Whether they intended a theoretical or the practical extension of the line was eminently a question for the jury to determine. In this connection it may be well to state several rules laid down in the books and sanctioned by the authorities:

1. Although the court should decide who holds title where it rests upon the legal effect of the deed, yet the court may instruct the jury that the legal title vests in a certain person or not, and leave it to them to decide as a fact who is entitled, where the identity of such person is in issue. This would apply equally to land, where the question of identity is involved.

2. The intention of the parties as apparent in a deed should generally control in determining the property conveyed thereby. But if the intent is not apparent from the deed resort may be had to the general rules of construction.

3. Where the words used in the description in a deed are uncertain or ambiguous and the parties have by their acts given a practical construction thereto, the construction so put upon the deed by them may be resorted to, to aid in ascertaining their intention.

4. The entire description in a deed should be considered in determining the identity of the land conveyed. Clauses inserted in a deed should be regarded as inserted for a purpose, and should be given a meaning that will aid the description. Every part of a deed ought, if possible, to take effect and every word to operate.

5. If recitals in a deed are inconsistent or repugnant, the first recital does not necessarily prevail over the latter, but the whole language of the deed is to be construed together in order that the true construction may be ascertained. In such a case the court will look into the surrounding facts and will adopt that construction which is the most definite and certain and which will carry out the evident intention of the parties. And if the land conveyed is sufficiently identified by certain parts of the description, an impossible or senseless course should be disregarded, and the deed sustained.

6. Where the description of the property intended to be conveyed is ambiguous, the identity of such property must be gathered from the intention of the parties as shown by the instrument itself and the accompanying circumstances, such as those surrounding and connected with the parties and the land at the time. Words may, if necessary, be qualified by intendment and particular clauses and provisions qualified, transferred, or rejected in order to ascertain the intention.

7. Another instrument may, in some cases, be construed with a deed as a part of the same transaction for the purpose of determining the identity of the property conveyed. And a recorded plat of lots may be construed with a deed in order to determine the dimensions of the property, or a town plan may be referred to.

8. The description of the property conveyed by a deed should be construed against the grantor and in the manner most beneficial to the grantee.

9. In order to ascertain the intention of the parties in respect to the property conveyed, reference may be had to the state of facts as they existed when the instrument was made and to which the parties may be presumed to have had reference.

10. A description of the property as occupied by the grantor may control other words in the description in determining the identity of the property conveyed. 13 Cyc., pp. 626, 627, 628, 630, and cases in the notes.

The full description in the plaintiff's deed is as follows: "Situate in the town of Greenville, Pitt County, North Carolina, on the southerly side of Fifth Street, and eastward side of Elizabeth Street and beginning at an iron stake on Fifth Street in said town of Greenville, located on the southern edge of Fifth Street, between the A. C. L. Railroad and Elizabeth Street and runs thence a southerly direction a straight line to a stake in the back line of the lot of Minnie O. Sugg; then a westwardly direction with the back line of Minnie O. Sugg lot to Elizabeth Street extended; thence with Elizabeth extended through its intersection with Fifth Street; thence with Fifth Street an eastwardly direction to the beginning, an iron stake, and being the westwardly portion of the lot conveyed by T. J. Jarvis, commissioner, to Minnie O. Exum by deed dated 19 September, 1894, and recorded in the register's office in Pitt County in Book S-5, page 378; Minnie O. Exum mentioned in said deed being the same person as Minnie O. Sugg, the grantor in this deed. Minnie O. Sugg, the grantor in this deed, hereby reserves to herself, her heirs and assigns the right of ingress and egress for the purpose of a driveway from Elizabeth Street extended over and across the lot herein conveyed along the back line of the same to the lot whereon the said Minnie O. Sugg now resides, adjoining the lot herein conveyed."

The words "through its intersection" were evidently intended for "to its intersection," for otherwise they would be meaningless. We have nothing, then, except the words "Elizabeth Street extended," but extended how: according to and with the lines it has north of Fifth Street, or extended as was done by the town? The word "extended" is not, of itself, sufficient to confine the description to the lines north of Fifth Street merely elongated, or in other words to the width at that part of the street, for standing by itself it may mean a theoretical extension, or one that is actual, which is sometimes called a practical one, that is, one which was made on the ground at the time of this conveyance. If there had been none such, it might well be argued that the call should be restricted to a theoretical location of the street's eastern line that would exactly correspond with the lines north of Fifth Street.

If we are governed by the rules adopted for our guidance and which are set out above, we must look at the description as a whole, giving effect to every material part of it. The very opening sentence is "situate on the southerly side of Fifth Street and the *eastward side of Elizabeth Street,*" and the latter words, which we have italicized, would surely call for inquiry as to where the east side of the street is, for the word "extended" is not used, in this connection. We may, under those rules, as we have seen, take into consideration that Mrs. Sugg has in the deed expressed the intention clearly to pass to B. B. Sugg "the westwardly portion of the lot theretofore conveyed by T. J. Jarvis, commissioner, to her," which was all the land west of the line GH, and extending to the eastern line of Wiley Vines, as she owned that land and acquired title to it under the Jarvis deed. We do not mean to say that this part of the description is controlling, but that it may be taken into consideration in order to determine what she intended to convey, as gathered from the entire deed.

It is said in 13 Cyc., 637: "The question as to what property passes by a deed may be controlled by a general clause conveying all of the grantor's property. The construction of a description with such a clause therein is dependent upon the intention of the parties, and where it appears from the entire deed that it was the manifest intention to convey all of the property of the grantor a construction consistent therewith will be given. In construing a clause of this character the rule applies that the language is to be construed against the grantor."

It is true that a particular description, which is clear and explicit and completely identifies the property intended to be conveyed, will not be varied or enlarged by a more general and less definite one, as, in such a case, the former will be considered as expressing more certainly and reliably the intent of the parties rather than the latter, but, notwithstanding this rule of construction, a general clause or recital in a deed, which broadens the terms of the grant, will not be altogether excluded as something that sheds no light on the meaning, though it does not override the other more definite call. 13 Cyc., 631 (e).

This doctrine which requires us to look at the whole deed and to give some effect, at least, to all of its several parts, was clearly stated, with apt citation of authority by *Justice Hoke* in *Railroad Co. v. Railroad Co.*, 147 N. C., at p. 382: "It is well recognized that the object of all rules of interpretation is to arrive at the intention of the parties as expressed in the contract, and that in written contracts which permit of construction this intent is to be gathered from a perusal of the entire instrument. In Paige on Contracts, sec. 1112, we find it stated: 'Since the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety. The problem is not what

the separate parts mean, but what the contract means when considered as a whole.' And while in arriving at this intent words are *prima facie* to be given their ordinary meaning, this rule does not obtain when the 'context or admissible evidence shows that another meaning was intended.' Paige, sec. 1105. And, further, in section 1106, it is said that the context and subject-matter may affect the meaning of the words of a contract, especially if in connection with the subject-matter the ordinary meaning of the term would give an absurd result. Again, as said by *Woods, J.*, in *Merriam v. United States,* 107 U. S., 441: "In such contracts it is a fundamental rule of construction that the courts may look to not only the language employed, but to the subject-matter and surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made.' And in Beach on Modern Law Contracts, sec. 702, the author says: 'To ascertain the intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects they had in view. The words employed, if capable of more than one meaning, are to be given that meaning which it is apparent the parties intended them to have.' " It is then added that parol testimony was properly received to show the attendant facts and circumstances for the purpose of a proper construction of the lease, citing *Ivey v. Cotton Mills,* 143 N. C., 189, and *Ward v. Gay,* 137 N. C., 397. Our conclusion is that the description in the deed is sufficiently indefinite to raise an issue for the jury to decide, under the guidance of the court upon the law, as to what the parties intended.

It was stated on the argument that the court ordered a nonsuit as to the *feme* plaintiff, because she had not filed her claim with the proper municipal authorities as required by Revisal, sec. 1384. This section, which corresponds with section 757 of the Code of 1883, has been construed by this Court in several cases and held not to apply to actions *ex contractu* where the damages are unliquidated, nor to torts. *Shields v. Durham,* 118 N. C., 450; *Frisbee v. Marshall,* 119 N. C., 570; *Sheldon v. Asheville, ibid.,* 606; *Nicholson v. Commissioners,* 121 N. C., 27, and finally in *Neal v. Marion,* 126 N. C., 412.

We do not see why she is a necessary party. If she did not, by her deed, convey this land to the plaintiff, but has retained the title in herself, her right and her action to recover the land, or damages for its taking, would be separate and distinct from his claim, and her present coplaintiff would have no interest therein, and if she did convey it, her presence is not required to vindicate his rights under the deed, as she had parted with the title to him. But had the plaintiff, B. B. Sugg, alleged that, if the land did not pass by the deed, it was intended that it should, and the description, if it was omitted by a mutual mistake of the

two plaintiffs in this action, and, upon this allegation, had asked for a correction, as he may yet do, with the permission of the court, then she would be a proper, if not a necessary party. On proper application to the court below, the plaintiff will, no doubt, be allowed to amend the complaint, so as to make the proper allegation in regard to the mistake, if there was one, and in the event that permission to amend is granted, Mrs. Sugg would be made a party, plaintiff or defendant, as the parties may be advised. If this is done and the jury decide, under the instructions of the court, that the deed did not convey the land, they could then pass upon the issue as to the mistake, and say whether or not the effect of the deed, as they thus find it to be, was produced contrary to the intentions of the parties, and that, while it was their purpose to convey the land, they had failed to insert it in the deed by their mistake or the inadvertence of the draftsman acting under their instructions.

It follows from what we have said that there was error as to the plaintiff B. B. Sugg, for which there must be a new trial. We do not think that Mrs. Sugg has appealed, and she tendered no separate case on appeal.

New trial.

THE EMPIRE MANUFACTURING COMPANY v. L. B. SPRUILL ET ALS.

(Filed October 13, 1915.)

1. Torrens Law—Parties—Pleadings—Clerk of Court—Interpretation of Statutes.

The clerk of the Superior Court, under the general provisions of Revisal, section 410, has the authority to permit persons claiming an interest in the land to be made a party defendant, and enlarge the time to answer, in proceedings to register a title under the provisions of chapter 90, Laws of 1913, known as the "Torrens Law."

2. Same—Superior Court Judge.

Under the provisions of chapter 90, Laws of 1913, known as the "Torrens Law," the judge of the Superior Court is given authority over the whole proceedings before the clerk, and to require reformation of the process, pleadings or decrees or entries, and therefore he has authority to allow parties defendant to be made and enlarge the time within which to file answers. Revisal, section 512.

3. Appeal and Error—Torrens Law—Premature Appeal—Decision Upon Merits.

An appeal from an order of the trial judge permitting answers to be filed after the time limited by the Torrens Law, chapter 90, Laws 1913, is premature; but at the request of both parties to this appeal, and owing to the public nature of the matter, the court passed upon the merits of the controversy, under former precedents.

ALLEN, J., did not sit; WALKER, J., concurs in the result.

MANUFACTURING CO. *v.* SPRUILL.

APPEAL by plaintiff from *Connor, J.*, at Spring Term, 1915, of PAMLICO.

Langston, Allen & Taylor and Murray Allen for plaintiff.
D. L. Ward and Z. V. Rawls for defendants.

CLARK, C. J. This action was begun under ch. 90, Laws 1913, known as the "Torrens Act." The petition was filed in the office of the clerk of the Superior Court of Pamlico on 20 March, 1914; summons was issued against the defendants therein named on 25 March, 1914, and returned served. At the same time the summons was issued notice of the action was duly published in the *Sentinel*, a newspaper in that county, as required by law. No answer being filed by the return day, the clerk delivered to the examiner of titles the petition with all the papers filed in the cause, with instructions to proceed with the examination of title according to the statute. On 8 June, 1914, the examiner of titles filed his report with abstracts of the various titles, and recommended that said titles be registered. On the same day several defendants filed answers denying the title of petitioner to certain portions of the land within the boundaries set out in the petition. The petitioner excepted to the order of the clerk permitting these answers to be filed. The cause was remanded to the examiner of titles for further examination, and on 22 December, 1914, he filed a second report, recommending the registration of the title of petitioner. The various defendants thereupon filed exceptions to the report of the examiner and the cause was transferred by the clerk to the civil-issue docket before *Connor, J.* The attorneys for the petitioner moved for a registration of the title. The judge denied the motion and remanded the proceedings to the clerk to refer the case again to the examiner of titles to investigate the matters involved in the answer filed by Benjamin Potter, and to report his findings of fact and conclusions of law upon the same. He overruled the exceptions which had been taken before the clerk, as above stated, and further ordered that the issues raised by the answers should be tried by a jury under the provisions of section 8, ch. 90, Laws 1913, eliminating and setting out in the order those issues, 8 in number, which were as to the title set up in the answers by 8 different defendants who alleged title in themselves to certain parts of the land described in the petition.

The petitioner assigned as error that the court overruled his several exceptions taken before the clerk to his order permitting the filing of the answers after the return day named in the summons.

The object of ch. 90, Laws 1913, known as the "Torrens Law," is to enable any person owning real estate to have the title thereto settled and registered in the manner prescribed by that chapter under the rules and procedures for other special proceedings. There is nothing in that act

which prohibits the clerk, who is clothed with the exclusive original jurisdiction of all proceedings under said act, from enlarging the time to file pleadings as prescribed by Revisal, 410.

This act is a beneficial one for the purpose of settling titles to real estate and to facilitate the transfer of the same without the expense of making a new investigation and abstract of the title at each successive conveyance. It has operated most beneficially and satisfactorily in the several countries and states that have adopted it. It has not been looked on with favor by some who believe that the act will deprive them of fees for the investigation and making an abstract of titles, but it was passed at the demand of the farmers and other owners of real estate to save that very expense. Its adoption was a matter of public policy, which was committed solely to the legislative department of the Government, and with which the courts have nothing to do.

But we find nothing in the act which can be construed as intending to cut off claimants of adverse titles from a full examination and decision of their claims. On the contrary, the act was intended to give, once for all, the fullest examination into all controversies over the title to the land set out in the petition, because thereafter the order of the court in such cause will be conclusive. With a provision in the act raising a fund for the payment of any claimant, such as infants, lunaties, or others, whose rights by any extraordinary concurrence of circumstances should not be adjudicated.

For this very reason the court in such cases should proceed with care. It certainly was not intended to take from the clerk or the trial court the discretionary power to make defendant any person "who has, or claims, an interest in the controversy adverse to the plaintiff," as authorized in all other litigation. Revisal, 410.

Revisal, 512, provides that the judge may, "in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order enlarge such time." This statute applies to all proceedings in the Superior Court, whether before the clerk or the judge, and there is nothing in the "Torrens Act" which deprives the judge of such power. On the contrary, there is no proceeding in which from its very nature this power should be more liberally exercised. The result of the litigation in this case will settle once for all time probably the title of a dozen or more litigants. While there should not be any undue delay in this, or in any other case, the court in a matter of this kind, especially, should give the fullest opportunity for examination and decision as to the titles of all persons claiming an interest in the property in question.

Section 9 of said ch. 90, Laws 1913, is as follows: "Every decree rendered as hereinbefore provided shall bind the land and bar all persons

claiming title thereto or interest therein, quiet the title thereto, and shall be forever binding and conclusive upon and against all persons, including the State of North Carolina, whether mentioned by name in the order of publication or included under the general description, 'To whom it may concern.' It shall not be an exception to such conclusiveness that the person is an infant, lunatic, or is under any disability, but such person may have recourse upon the indemnity fund provided, for any loss he may suffer by reason of being so conclusive. *Such decree shall, in addition to being signed by the clerk of the Superior Court, be approved by the judge of the Superior Court, who shall review the whole proceeding, and have power to require any reformation of the process, pleadings, decrees, or entries.*"

The intention of the act is that in this proceeding, which is intended to quiet titles and prevent future litigation over the same, there shall be every safeguard, and the judge certainly has the same power as in all other cases to permit an answer to be filed "after the time limited." Even if these defendants had not made the application to answer, as they did before the clerk, the judge could, in his discretion, have permitted the answers to be filed before him. He is required to "review the whole proceeding and has power to require any reformation in the process, pleadings, decrees or entries."

The power under Revisal, 512, to permit pleadings to be filed after the time limited is a discretionary one and not reviewable by appeal. Under the provisions of this act above cited it is made the duty of the judge to review the whole proceedings and to require any reformation of the process, pleadings, decrees or entries. Not only such order is not reviewable by appeal because it is a matter within the discretion reposed in the judge by the statute, but even if such order were reviewable, an appeal therefrom would be premature, for such order is not a finad judgment. If the answer is filed, the plaintiff might at the trial recover judgment notwithstanding, and there would then be no necessity, or desire by him, to bring the matter up for review.

While, therefore, we must dismiss the appeal, we have, however, owing to the public nature of the matter, and at the request of counsel on both sides, passed upon the point presented as this Court has sometimes done. *S. v. Wylde,* 110 N. C., 503; *Christian v. R. R.,* 136 N. C., 324, and in several other cases.

Appeal dismissed.

ALLEN, J., not sitting.

WALKER, J., concurs in result.

L. E. EVERITT v. AUSTIN BROTHERS.

(Filed 13 October, 1915.)

Process — Nonresidents — Summons — Publication — Property — Courts — Jurisdiction.

A valid service of summons by publication cannot be made on a nonresident defendant unless he has property within the State which is brought under the control of the court; and where in attachment proceedings it appears that no property of the defendant has been reached or levied on, and the defendant has entered a special appearance for the purpose, his motion to dismiss will be allowed.

APPEAL by defendant from *Carter, J.*, at the May Term, 1915, of EDGECOMBE.

Action to recover damages for personal injury.

The defendants are nonresidents and no process has been served on them. A warrant of attachment has been issued and a copy of the same was served on the board of commissioners of the county of Edgecombe, but there is no allegation that the county of Edgecombe is indebted to the defendant. The defendants entered a special appearance and moved to dismiss the action on several grounds assigned in a written motion. The motion was allowed, and the plaintiff excepted and appealed.

Daniel & Warren and Manning & Kitchin for plaintiff.
Henry A. Gilliam for defendant.

ALLEN, J. When there is no personal service of process upon a nonresident defendant, the substituted service by publication is effectual only where property in the State is brought under the control of the court and subject to its disposition by process adapted to that purpose (*Pennoyer v. Neff*, 95 U. S., 714; *Winfree v. Bagley*, 102 N. C., 517), and as it does not appear that any property of the defendants has been reached or levied upon by the attachment issued in the action, and as there is no allegation that the county of Edgecombe, upon whom the warrant of attachment was served, is indebted to the defendant, the judgment of his Honor must be affirmed. There are other irregularities which it is not necessary to consider.

Affirmed.

ALONZO THOMAS v. CARVEY A. MERRILL.

(Filed 13 October, 1915.)

1. Liens — Work Done — Severed Trees — Personalty — Interpretation of Statutes.

One who enters into a contract to cut, haul and raft logs after the standing timber upon lands have been felled for the purpose, has, while logs are in his possession, a lien thereon for the services thus performed, under the provisions of Revisal, section 2017, the timber after its severance from the land being regarded as personalty. As to whether the lien rested also by common law, *quœre.*

2. Same—Vendor's Lien—Claim and Delivery—Accounting—Value of Property Seized.

The plaintiff contracted to sell the standing timber on his lands to L., the latter to cut, haul and remove it, and pay therefor at a certain price per thousand feet. L. contracted with the defendant that the latter should receive a certain sum per thousand feet for cutting, hauling, rafting the logs after the latter had been felled. L. abandoned his contract with the plaintiff, who took possession of the logs that had been cut and hauled, by claim and delivery proceedings, from the defendant, the value of which exceeded the amounts due by L. to both the plaintiff and defendant; but the logs were lost or not available for a sale thereof. *Semble,* the plaintiff did not have a lien on the logs for the purchase price, and *Held,* that the plaintiff must account to the defendant for the value of the logs, and the latter is entitled to recover the amount due him for cutting and hauling them.

3. Contracts—Deeds and Conveyances—Felled Timber—Personalty—Statute of Frauds.

An agreement to cut, haul, etc., timber after it has been severed from the lands relates to personal property, and does not come within the provisions of the statute of frauds, requiring contracts affecting real property to be in writing.

APPEAL by plaintiff from *Connor, J.,* at the June Term, 1915, of CARTERET.

Civil action tried before *Connor, J.,* a jury trial having been waived, and a case stated for the opinion and judgment of the court, which is as follows:

1. The plaintiff, Alonzo Thomas, was at the time of the institution of this action, and prior thereto, the owner in fee and in possession of a tract of land situated in Carteret County, upon which was standing, growing and lying certain timber trees.

2. That prior to the institution of this action the plaintiff, Alonzo Thomas, entered into a contract with the Newport Lumber and Manufacturing Company, by which plaintiff sold to said company, at $4.50 per thousand feet (to be paid when said trees had been cut into logs and measured, and before said logs had been removed from the land), such of said trees, in specified dimensions, as the Newport Lumber and Manufacturing Company should cut or cause to be cut into logs.

3. That after the making of the contract aforesaid between plaintiff and the Newport Lumber and Manufacturing Company, the latter company contracted with the defendant Merrill for the cutting, hauling and rafting of the logs after said trees had been felled, and under said contract defendant Merrill was to receive from said Newport Lumber and Manufacturing Company the amount of $4.50 per thousand feet.

4. Thereafter, and pursuant to the contract, defendant Merrill did cut, haul and raft certain logs, which are the subject-matter of this action. That the Newport Lumber and Manufacturing Company failed to pay the plaintiff Thomas the sum of $4.50 per thousand feet for the logs, or any part of same, and failed to pay to defendant Merrill the amount due him by said Newport Lumber and Manufacturing Company for the cutting, hauling and rafting of the logs. Then the plaintiff instituted this action to recover possession of the logs and sued out a writ of claim and delivery for the same against this defendant, the Newport Lumber and Manufacturing Company having theretofore notified the plaintiff Thomas that it would not pay for the said timber logs and that it had abandoned its rights under the contract. That under said writ of claim and delivery the sheriff of Carteret County took from the possession of the defendant Merrill, and delivered into the possession of the plaintiff Thomas, 470 logs, containing approximately 34,000 feet log measure, which, when so taken into the custody of the sheriff, were worth the sum of $370.

5. That the amount due the defendant Merrill by the Newport Lumber and Manufacturing Company upon his contract for cutting, hauling and rafting the logs is $156.81, and that this sum the Newport Lumber and Manufacturing Company has failed to pay.

6. When logs were taken from defendant, they were in rafts in Ware Creek.

Upon the foregoing facts the court is of opinion, and so finds:

1. That the plaintiff Thomas is the owner and entitled to the possession of the timber logs until he has been paid from the proceeds of the sale of the same the amount of $4.50 per thousand feet, pursuant to the contract between him and the Newport Lumber and Manufacturing Company, with interest from 9 September, 1913, together with the costs of this action, as taxed by the clerk of this court, towit, $17.90.

2. After that sum has been paid to the plaintiff Thomas, the defendant Merrill is entitled to be paid from the proceeds of the sale of the logs, under his contract with the Newport Lumber and Manufacturing Company, the sum of $156.81, with interest from the date of the seizure by the sheriff.

3. If any balance is left, after the payment of the amount set forth in the first two conclusions above, the plaintiff Thomas is entitled to

retain the same, since the Newport Lumber and Manufacturing Company, prior to this action, abandoned any claim to the timber logs under the contract with the plaintiff. It further appearing to the court that the logs cannot now be found for sale, the plaintiff Thomas is liable to account with defendant to the value of the said logs at time of seizure, towit, $370.

It is therefore adjudged that defendant recover of plaintiff the sum of $156.81, with interest from 9 September, 1913, and that Thomas retain the balance as the owner of the same.

GEORGE W. CONNOR,
Judge Presiding.

Julian F. Duncan for plaintiff.
Abernethy & Davis for defendant.

WALKER, J., after stating the case: We are unable to see why the conclusion of *Judge Connor,* upon the facts stated, was not correct. The plaintiff was entitled to be paid by the Newport Lumber and Manufacturing Company the price of the timber, and conceding, for the sake of the discussion, that it could seize the logs for the purpose of securing the payment of this debt, it was, nevertheless, under an obligation to hold the logs for the defendant Merrill's benefit as well as its own, if he had a lien on them for work and labor performed by him for the Newport Lumber and Manufacturing Company in the cutting, hauling and rafting of the logs. This must be so, as it appears that the logs, when taken under the writ sued out at the instance of the plaintiff, were worth enough to pay both claims. The fact that plaintiff lost the possession of the logs and cannot recover the same for the purpose of selling and converting them into money to pay the debts cannot be allowed to prejudice the defendant Merrill, as it was not his fault that they have been lost, or cannot now be found, but was solely and entirely the fault of the plaintiff. Nor can the fact that the Newport Lumber and Manufacturing Company has abandoned its rights under the contract with plaintiff have any prejudicial effect upon the claim of defendant Merrill against it. The company, even with the approval of the plaintiff, cannot deprive him of any right he may have, with respect to the logs, without his binding consent.

The next question is, whether Merrill has any lien on the logs under his contract with the company. We have assumed that his lien, if he has any, is subordinate to that of the plaintiff for the purchase money of the timber, as defendant Merrill has not appealed, and must be understood as not disputing this proposition. Nor need we pass upon it, for another reason, namely, that the value of the logs which have passed into the hands of the plaintiff, or of which, in law, he received the

benefit, is more than sufficient to cover the amount of both claims. The case, therefore, is practically confined to the question of defendant's lien. Under the contract between the company and the plaintiff, the title to the timber passed to the former, subject to plaintiff's lien for the purchase money, if he had one. The contract contemplated that the timber should be cut and made into logs, which were to be "rafted and hauled" to Ware Creek, where the plaintiff caused them to be seized, under legal process, while they were in the possession of defendant.

It is not necessary for us to decide whether Merrill had a common-law lien on these logs. That feature of the question is treated to some extent in 25 Cyc., 1580, 1581, and notes. Jones, in his work on Liens (2 Ed.), sec. 702, says that, at common law, laborers engaged in cutting, hauling and driving timber had no lien thereon, and, therefore, can assert none, except by statute or special contract, as it is indispensable to the continuance of such a lien at the common law that the party claiming it should have the possession of the article of property upon which it rests, and a laborer generally works under a contractor, and consequently cannot retain the possession, because he holds possession of the thing for the contractor, and, in law, his possession is not his own, but that of the contractor, as against the owner, implying that if he contracts directly with the owner, in his own behalf, and cut the timber into logs, he will have a lien thereon; and in the next section (703) he says: "One who has cut and hauled to his mill a quantity of timber from the land of another, under a contract with him, has a lien at common law for his labor upon the lumber in his possession remaining manufactured from the timber, and also upon the logs unsawed. In like manner one who saws the logs of another into lumber and shingles has a common-law lien thereon for the value of such work," citing *Palmer v. Tucker*, 45 Me., 316; *Arians v. Brickley*, 65 Wis., 26 (56 Am. Rep., 611). But we can decide this case without expressing any opinion upon the legal merits of the doctrine thus stated by that writer, as we think that the defendant, Carvey A. Merrill, had a lien on the logs under our statute. His personal labor and skill were bestowed directly in cutting and shaping the timber into logs. The trees were felled and converted, in accordance with the terms of the contract between the principals, into logs, that being the object of making the agreement for the cutting of the timber.

By Public Laws of 1913, ch. 150, sec. 6 (Gregory's Supplement, sec. 2023-a), it is enacted that "Every person doing the work of cutting and sawing logs into lumber, getting out wood pulp, acid wood, or tan-bark, shall have a lien upon the lumber for the amount of wages due them, and such liens shall have priority over all other claims or liens upon said lumber except as against a purchaser for full value and without

notice thereof." Provision then follows for making the lien effective and giving notice, if the owner be found, by posting it on the pile of wood, lumber or other articles, and when this is done, subsequent purchasers of it take subject to the rights of the lienor. In *Glazener v. Lumber Co.,* 167 N. C., 676, it was held by a divided Court that even under the act of 1913 the work must have been done directly by the claimant in betterment of the property upon which the lien is alleged to rest, and that Hogsed, who aided in making the lumber by taking the boards from the saw as they were cut, was entitled to a lien, but that Glazener, who was employed in the blacksmith shop as repairer of cars used as part of the plant, and Fisher, who worked on the car track and repaired the bridges, were not so entitled. *Justice Hoke* and the writer dissented from this view, holding that it was all one common enterprise, each of the employees contributing his share in work or labor to the general result of converting the lumber into boards, and that it made no difference whether he stood at or near the saw or was otherwise directly engaged in operating it or in feeding the logs to it, or in removing them from the saw frame after they had been cut, and that the act of 1913, ch. 150, was passed to prevent the application of that principle, as settled by former adjudications of this Court (*Tedder v. Railroad Co.,* 124 N. C., 342), to such a case. But, however that may be, in this case the work of cutting, hauling and rafting the logs was done directly for the betterment of the property, and not remotely and collaterally, as held in the *Glazener case,* and it is therefore not governed by the principle of that decision, as contended before us.

This case comes well within the meaning and remedy of our statute, Revisal, sec. 2017, as to liens of a mechanic or artisan on any article of personal property, for any just or reasonable sum due to him by the owner thereof, where he has made, altered or repaired it at the request of the owner or legal possessor thereof. It will be observed that Merrill's contract was to cut, haul and raft the logs after the trees had been felled or severed from the freehold and became personal property. *Ives v. Railroad,* 142 N. C., 131, where it was held that a contract for the cutting of standing trees and the conversion of them into cordwood related to personal property and was not within the statute of frauds, requiring contracts affecting real property to be in writing. It is true, therefore, and *a fortiori,* that where the contract refers to trees already cut down, it affects personal property only.

This brings the case within the terms and intent of Revisal, sec. 2017 (*Huntsman v. Lumber Co.,* 122 N. C., 583), as Merrill had not parted with the possession when the logs were seized by the sheriff under the writ issued at plaintiff's request. *McDougall v. Crapon,* 95 N. C., 292; *Block v. Dowd,* 120 N. C., 402; *Tedder v. Railroad Co., supra.* But

Revisal, sec. 2016, provides as follows: "Every building built, rebuilt, repaired, or improved, together with the necessary lots on which such buildings may be situated, and every lot, farm, or vessel, *or any kind of property not herein enumerated,* shall be subject to a lien for the payment of all debts contracted for work done on the same or material furnished." And this language, especially the words italicized by us, are comprehensive enough to include the case presented by the facts as they appear in the record, but it may be that Merrill cannot avail himself of that section, as he has taken no proceedings to enforce his lien under it and Revisal, section 2026, if such be required where the property partakes of the nature of personalty. We think, though, that his right is clear under section 2017, and we are disposed to rule that he has also a lien at common law, according to the authorities, the property being personal. It would be a strange *casus omissus,* if the law has created a lien in almost every imaginable case where labor is performed, and has failed to provide for a case so meritorious as this one.

It is not altogether certain whether, under this contract, when fairly construed, any lien was given to the plaintiff, or whether the obligation to pay $4.50 per thousand feet was a personal one merely; but we will not pass upon this question, as it is not necessary to our decision of the case, and it is of too serious a character to be considered and foreclosed without due deliberation, nor until we are called upon to do so by the exigency of the case.

There was no error in the judgment of the court upon the case stated. Affirmed.

A. H. BANGERT v. JOHN L. ROPER LUMBER COMPANY.

(Filed 13 October, 1915.)

1. Equity—Contracts—Interpretation—Forfeitures.

Equity does not favor forfeitures or penalties, and will relieve against them when practicable and in the interest of justice; and a court of equity will not be astute to place a construction upon a contract that will cause a forfeiture when another and reasonable construction may be placed upon it and avert such forfeiture.

2. Deeds and Conveyances—Timber Deeds—Extension Period—Terms—Successive Payments—Payment for Period.

Ordinarily the provision which allows an extension of time for cutting timber must be complied with by the grantee in accordance with the terms of the conveyance, in order that he may take advantage thereof; but where a time for cutting and removing has been fixed by the conveyance, with provision that the grantee may extend the time from year to year for five years upon giving notice and paying a certain fixed sum each year in advance, and it is admitted that before the expiration of the original period for cutting the grantee notified the grantor that he would

avail himself of the full extension period of five years and tendered the sum specified, covering the full extension period, which the grantor refused, it is *Held*, that the notice and prepayment required of the grantee for each successive year was inserted for the grantee's advantage, and that notice and tender of payment made in apt time for the full five years period was sufficient.

CLARK, C. J., and HOKE, J., dissenting.

APPEAL by defendant from *Connor, J.*, at the May Term, 1915, of CRAVEN.

Civil action to perpetually enjoin the cutting of timber upon certain lands. The court rendered judgment enjoining the defendants from cutting and removing the timber and adjudged that certain funds in hands of trustees and deposited in bank, the proceeds of timber cut, be paid to plaintiff. The defendant appealed.

R. A. Nunn for the plaintiff.
Moore & Dunn for the defendant.

BROWN, J. The admitted facts are that defendant, as assignor of the Blades Lumber Company, acquired the right to cut and remove within ten years certain timber on plaintiff's land by virtue of a deed dated 1 November, 1901, containing the following extension clause:

"And the party of the first part hereby contracts and agrees to extend the time within which the parties of the second part are to cut and remove said timber from said land, after the expiration of the term hereinbefore specified for the removal thereof, from year to year for a period of five years, said extension to be made yearly upon the request of the parties of the second part, the said parties of the second part to pay to the party of the first part upon each yearly extension of said time the sum of twenty-five dollars."

It is admitted that in January, 1911, shortly before the original time for cutting the timber expired, and prior to the time when the five years extension clause began to run, the defendant duly notified plaintiff that it would take the entire five years extension given it under the contract, and at same time tendered the plaintiff $125, being $25 per annum for the five years. The defendant refused to accept the money, but stated he would extend the time each year upon payment of $25 per annum. The defendant notified plaintiff before the close of each year that it would avail itself of the extension, and paid the $25 to plaintiff, but, after notifying plaintiff in apt time before the close of last year, defendant did not tender the last $25 until four days after that year expired.

We have held that the provision as to extensions in a timber deed, when properly taken advantage of and made available, permits the

grantee to cut and remove the timber for the period of time covered by the extension. *Bateman v. Lumber Co.*, 154 N. C., 250.

It is also held in *Powers v. Lumber Co.*, 154 N. C., 405, that where the instrument requires payment of interest on original purchase price "each year in advance," for an extension, tender of such interest not made within the time specified in the deed is insufficient. We adhere fully to what is decided in those cases, but there are two distinguishing features between them and the case before us. This contract does not necessarily require payment in advance, as in the *Powers case*. Its language is, "the said parties of the second part to pay to the party of the first part upon each yearly extension of said time the sum of $25."

The notice being given in apt time, and the money tendered only four days after, it may well be considered doubtful if equity will so construe the contract as to cause a forfeiture of defendant's entire interest. It is doubtful if it requires payment in advance, as in the *Powers case*.

Equity does not favor forfeitures or penalties, and will relieve against them when practicable, in the interest of justice. 2 Story Eq., page 644; *Carpenter v. Wilson*, 59 Atl. Rep., 187; *Seldon v. Camp*, 95 Va., 528.

A court of equity will not be astute to place a construction upon a contract that will cause a forfeiture when another and reasonable construction may be placed upon it, and avert such forfeiture. But as the plaintiff rests his right upon the strict letter of the contract, we think the defendant may well do the same.

It is admitted that the defendant gave full notice, before the original period for cutting the timber expired, of its intention to take the whole five years granted it in the deed. It is also admitted that at same time, and before the five years extension commenced to run, the defendant tendered the plaintiff the entire $125, in full payment for the whole period of five years extension, and plaintiff refused to accept it. Upon this state of facts a court of equity surely ought not to declare a forfeiture of defendant's rights under the contract, and enjoin the cutting of the timber within the extension period.

As we construe the extension clause, the defendant had the right to take an extension for one year only, or for as many as five years. The reason the payment was fixed at $25 annually was because, when the deed was made in 1901 to the Blades Company, it was not known what extension period the grantee or its assigns would desire at expiration of the original ten years in 1911, within which to remove the timber, whether one year or as many as five years, if desired, at the rate of $25 per annum.

This clause was put in the instrument solely for the defendant's benefit, and not for the plaintiff's. It was the defendant's privilege,

under the contract, to exercise its right in January, 1911, before the ten years expired, and to notify plaintiff that it would avail itself of the entire period of five years extension and to tender the money. When defendant did so, it performed every requirement and condition of the contract upon its part. The defendant is in no default, and it was plaintiff's duty to accept the money. The injunction is dissolved, and a decree will be entered in the Superior Court requiring the trustee to pay the plaintiff $25, and the remainder of the fund to the defendant.

All costs will be taxed against the plaintiff.

Reversed.

CLARK, C. J., dissenting: The contract between the parties is that there can be an extension *"from year to year,* for a period of five years, said extension to be made *yearly,* upon the request of the parties of the second part, the said parties of the second part to pay to the party of the first part, upon each *yearly* extension of said time, the sum of $25." This is the contract of the parties, and I do not think the courts have the right to modify or change it, and that the court below decided it correctly.

HOKE, J., dissenting.

CHARLES L. ABERNETHY v. BOARD OF COMMISSIONERS OF PITT COUNTY.

(Filed 13 October, 1915.)

1. Statutes—Interpretation—Intent.

When construing a statute the words used therein will be given their ordinary meaning, unless it appears from the context that they should be taken in a different sense; and where the statute is plainly and unambiguously expressed, conveying a single, definite, and sensible meaning, where no construction is allowable, its intendment must be ascertained from the language used, and a literal meaning given it.

2. Same—Words Omitted.

When it is necessary to carry out the clear meaning of a statute, and to make it sensible and effective, the court may interpolate the words necessary thereto, which were evidently omitted, as appears from the context, or silently understand them to be incorporated in it. *Fortune v. Commissioners,* 140 N. C., 322.

3. Statutes—Interpretation—In Pari Materia.

To ascertain the mischief which an act of the Legislature was intended to remove, it is permissible, in the interpretation thereof, to consider other statutes, related to the particular subject, or to the one under construction.

4. Same—Solicitors' Salaries—Fees.

A legislative enactment created a recorder's court in a certain county, giving it extensive jurisdiction of criminal offenses committed therein,

and also enacted a law directing the county commissioners to pay the solicitor of the district six hundred dollars annually "in lieu of fees now provided by law." *Held*, construing these two statutes together, that the Legislature intended to compensate the solicitor for the fees he would be deprived of by the establishment of the recorder's court, by paying him a sum certain as a salary in lieu of all fees, whether full fees paid by solvents or half fees paid by the county for insolvents (Revisal, section 2768), upon convictions had.

5. Same—Implication.

Interpreting an act directing the county commissioners to pay the solicitor in that district six hundred dollars "in lieu of fees now provided by law, which the said solicitor would receive from the said county . . . on account of convictions in the criminal courts of the county by said solicitor": *Held*, the intent of the Legislature unmistakably being that the stated salary was to be in lieu of all fees, including the half fees paid by the county for insolvents, it is necessarily implied that all the fees shall be turned into the county treasury to increase its general fund, the fees that he would otherwise have received having been commuted in this way, and the county receiving the fees in return for the salary paid.

6. Statutes—Interpretation—Intent—Affidavits of Legislators.

The intent of the Legislature is expressed in the statute, and must be ascertained from its words; therefore, affidavits of Senators and Representatives in the Legislature as to its meaning will not be considered for the purpose of construing it, where construction is necessary.

APPEAL by defendant from *Bond, J.*, at the August Term, 1915, of PITT.

Civil action, heard upon a case agreed, submitted, under the statute, as a controversy without action, which is as follows:

There has arisen a controversy between the board of commissioners of Pitt County and Charles L. Abernethy, solicitor of the Fifth Judicial District, relative to the meaning and construction of an act of the Legislature, towit, Public Laws of 1915, ch. 623, which reads as follows:

The General Assembly of North Carolina do enact:

SECTION 1. The board of commissioners of the county of Pitt are hereby directed, authorized, and empowered to cause the treasurer of Pitt County to pay the solicitor of the Fifth Judicial District the sum of six hundred dollars annually, to be paid monthly in lieu of fees now provided by law, which the said solicitor would receive from time to time from the county of Pitt on account of convictions in the criminal courts of the county by said solicitor.

SEC. 2. This act shall be in force from and after its ratification.

Ratified this the 8th day of March, A. D. 1915.

The said Charles L. Abernethy, solicitor, plaintiff, contends that the act means that he is to receive from the county of Pitt the sum of six hundred dollars annually in lieu of such fees as the county would be bound to pay the said solicitor from the treasury of the county, under

former law, and that under the law, since said act was passed, he is in addition thereto entitled to receive such fees as defendants pay themselves in the criminal Superior Courts of said county in cases wherein there are convictions of said defendants in criminal cases. The commissioners of the county of Pitt contend that the said act means that all fees the said solicitor would receive are to be paid into the treasury of Pitt County, and that he is not to receive any sum for prosecuting crimes, or from any other source in the said county, except the said sum of six hundred dollars per annum, and that the same shall be in lieu of all compensation or fees to be received by said solicitor for all services rendered by him in his official capacity, except twenty dollars a term from the State for attending court.

Now, therefore, in order that the question in difference, which might be the subject of a civil action, may, without such action, be settled between the parties, the said board of commissioners of Pitt County, through their attorney, and the said Charles L. Abernethy, hereby submit the said act for interpretation to his Honor, *W. M. Bond, Judge,* riding the courts of the Fifth Judicial District, to the end that the said question may be determined by the court, each party reserving the right to appeal to the Supreme Court.

This statement of case, with the attached statement of the said solicitor and the Senator and the Representatives, shall constitute the record.

S. J. EVERETT,
Attorney for the Board of Commissioners of Pitt County.

(Verified.)

CHARLES L. ABERNETHY,
Solicitor of the Fifth Judicial District.

Statement of Senator and Representatives, referred to in case agreed:

We, the undersigned, being the Senator and Representatives of Pitt County in the Legislature of 1915, state, in reference to the Public Laws of 1915, chapter 623, set out in the statement of case between the solicitor of the Fifth Judicial District and the commissioners of Pitt County, that it was our understanding and agreement with the solicitor, when the act was passed, that it would include all the fees of every kind that he was to receive in his official capacity as prosecuting attorney and solicitor for services in Pitt County, and repealed all other laws in conflict therewith.

This 30 August, 1914. (Signed) F. C. HARDING,
Senator.
J. J. LAUGHINGHOUSE,
J. C. GALLOWAY,
Representatives.

Statement of solicitor:

The undersigned solicitor of the Fifth Judicial District says, with reference to the statement of the Representatives from Pitt County, that there is a very great difference in his understanding and theirs as to the bill that was passed, towit, chapter 623 of the Public-Local Laws of 1915. The said solicitor very much regrets any misunderstanding between the Representatives and himself, and accords to them the right to have their own understanding, but respectfully submits to the court that the act, which is the matter in controversy, speaks for itself, and the proper legal construction of the same can be and is the only understanding that there could be between the Representatives and the solicitor. That prior to the passage of this act the solicitor received, from all sources from the county of Pitt and the defendants, amounts aggregating from twelve to sixteen hundred dollars per year. If the act should be construed as the solicitor contends it should be, the county of Pitt will receive a part of the compensation, which would be coming to the solicitor under the general law, in excess and in addition to what the said county of Pitt would be liable for to the solicitor from the prosecution of the criminal dockets of said county. To show the good faith of the solicitor in his contention, if the matter could be so construed by the court, he is perfectly willing that the act be declared null and void, and to leave the matter as it would have been without the passage of the act. If the act should be construed by the court as the solicitor contends, the county of Pitt will be the gainer by the act and the solicitor would be the loser.

Respectfully submitted,

CHARLES L. ABERNETHY,
Solicitor.

The court rendered the following judgment:

This cause coming on to be heard on a controversy submitted without action, on agreed facts, under The Code, both sides being present, upon consideration of the facts agreed the court is of opinion that the meaning of the statute must be arrived at solely by a construction of its language, and that its meaning cannot be shown, or assisted, or affected in any way by any actual or supposed agreement on the part of members of the Legislature which passed the act.

The court is further of the opinion that the compensation provided in the act referred to, to be paid to said Abernethy by said county of Pitt, is in lieu of such fees as said county would have had to pay under the law existing at the time said act was passed in cases of conviction against insolvents, and that it has not in any way affected the right of said Abernethy to collect and receive, just as he has done before the passage of said act, all fees taxed by law against defendants who paid

the cost. This view of the matter is strengthened in the opinion of the court by reason of the fact that said law contains no provision ordering the payment into the county treasury of any fees paid by convicted defendants who were or are able to pay the cost taxed against them.

It is therefore considered, ordered and adjudged, that as to all cases of convictions against defendants who pay the cost, said Solicitor Abernethy is entitled to his fees in such cases just as if the said act had not been passed, and that the county of Pitt has nothing whatever to do with any of the fees taxed in favor of the solicitor, except those in cases of insolvent defendants. The monthly payments are in lieu of such sums as the county of Pitt would have had to pay to said Abernethy, in cases of conviction of insolvents, if said act had not been passed.

It is adjudged that said C. L. Abernethy recover the costs of this case, to be taxed by the clerk of this court, against the defendants.

This 4 September, 1915. W. M. BOND, *Judge.*

Defendant excepted to the judgment and appealed to this Court.

M. Leslie Davis for plaintiff.
S. J. Everett for defendant.

WALKER, J., after stating the case: This is an unfortunate controversy which has arisen between the parties, growing out of their misunderstanding as to what was intended to be done, and as to the manner of expressing their purpose, if they had fully agreed upon the matter; but we must seek for and find the intention by the rules prescribed for legal interpretation, where there is any doubt as to the meaning of a statute or other instrument. The words used shall be given the ordinary meaning, unless it appears from the context, or even otherwise, in the statute, that another and different sense was intended. The object of all interpretation, or construction, is to ascertain the meaning and intention of the Legislature, to the end that the same may be enforced, which must be sought first of all in the language of the statute itself, for it must be presumed that the means employed by the Legislature to express its will are adequate to the purpose, and do express that will correctly.

If the language of the statute is plain and free from ambiguity, and expresses a single, definite, and sensible meaning, that meaning is conclusively presumed to be the one which the Legislature intended to convey, or, in other words, the statute must then be interpreted literally. Even though the court should be convinced that some other meaning was really intended by the law-making power, and even though the literal interpretation should defeat the very object of the enactment, still the explicit declaration of the Legislature is the law, and the courts must not depart from it.

If the language of the statute is ambiguous or lacks precision, or is fairly susceptible of two or more meanings, the intended sense of it may be sought by the aid of all pertinent and admissible considerations. But here, as before, the object of the search is to find the true intention of the Legislature, and the Court is not at liberty, merely because it has a choice between two constructions, to substitute for the will of the Legislature its own ideas as to the justice, expediency, or policy of the law. Black on Interpretation of Laws, pp. 35, 36. The object, therefore, being to extract from the language itself the intent or purpose, so that the legislative will may be enforced, we proceed to consider a little further what may specially be done as permissible under this rule.

Where the meaning is plain and unmistakable, the rule does not require that we should construe the statute with such literal exactness as to exclude the right to insert words evidently omitted as appears from the context, for they may be interpolated or silently understood as incorporated in it, when it is necessary to carry out the clear meaning and to make the statute sensible and effective. Black on Interpretation of Laws, p. 84, sec. 40. Another way to express this idea is, that when the language is elliptical, the words which are obviously essential to complete the sense will be supplied, but they should never be inserted, nor should the words which are used undergo any change, unless finally to effect a meaning manifestly appearing from the other parts of the statute, and to execute fully the intention somewhere expressed. (*Ibid.*, pp. 84, 85, and cases cited in the notes.) Mr. Black states numerous instances, at pp. 85, 86, where a word and even words have been put into a statute to fill it out according to the evident meaning gathered from a consideration of its context.

The foregoing principles were substantially stated and applied by us in *Fortune v. Commissioners*, 140 N. C., 322. We there said, at p. 327: "The use of inapt, inaccurate or improper terms or phrases will not invalidate the statute, provided the real meaning of the Legislature can be gathered from the context, or from the general purpose and tenor of the enactment. Clerical errors or misprisions which, if not corrected, would render the statute unmeaning or incapable of reasonable construction or would defeat or impair its intended operation, will not necessarily vitiate the act, for they will be corrected, if practicable. Nor will mere inadvertences or omissions have that effect, provided they can be supplied by reference to the context or to other statutes, and the true reading of the statute made obvious and its real meaning apparent." We may call to our aid, then, other laws or statutes related to the particular subject, or to the one under construction, so that we may know what the mischief was which the Legislature intended to remove or to remedy.

Having these principles clearly set before us for our guidance, and not being unmindful of some others subsidiary to them, and of more or less importance, but which it is not necessary to set out, we proceed to consider the act under review and to seek for its true meaning according to these rules of interpretation. The Legislature, on the very day that this act was ratified, had passed another by which it established a recorder's court in the county of Pitt, with a large and extensive jurisdiction of criminal offenses in that county. This of necessity withdrew many matters of a criminal nature from the jurisdiction of the Superior Court, wherein the solicitor represented the public interests and prosecuted in behalf of the State, and consequently reduced his income from that source. It was in fairness to him, or to prevent any injustice by this lowering of his receipts from his official business in the county, that this act was passed, and we must construe it in the light of this fact.

The statute, upon its face, shows that it was passed to correct some evil that might follow if his compensation was not gauged by the salary instead of the fee basis. This helps us greatly to discover the real meaning of the act. The solicitor contends that he was to get the six hundred dollars in lieu of the half fees he had theretofore or under the former law received from convictions of insolvent persons, which were paid by the county (Revisal, sec. 2768), and not by the defendants themselves, as in cases where they were solvent and able to pay. Revisal, sec. 1291. But we cannot accept this as correct, because the language of the act, when properly construed, will not permit us to do so, and we are confined to that, as if we depart from it we may be in danger of disappointing the intention of the Legislature. It was said on the argument, and not disputed, that the annual average of insolvent fees in the county had been about two hundred and fifty dollars, and if this be true, the Legislature surely did not intend to give nearly three times as much in lieu thereof. But not being influenced by this fact, as stated, we think the act itself furnishes sufficient evidence of the meaning intended to be given to it, and we cannot escape the conclusion that the learned judge misconstrued it, notwithstanding the *casus omissus* which was supposed to make its meaning very clear.

The act provides that the defendants shall cause to be paid annually by the county treasurer to the solicitor, in monthly installments, the total sum of six hundred dollars "in lieu of fees *now provided by law,* which the said solicitor would *receive* from time to time from the said county of Pitt *on account of convictions in the criminal courts of the county by said solicitor.*" (Italics ours.) There is not one word of reference to solvent or insolvent defendants, to whole fees or half fees, but, on the contrary, the amount is to be paid in full compensation to

him, or in lieu of fees, according to the present scale, which he would receive from the county in all cases where there were convictions in criminal cases prosecuted by him. There is no allusion to half fees, or to any fees for which the county alone would be bound by reason of the insolvency of defendants, but the expression is broad and all-inclusive, embracing every prosecution by him of a criminal case in any court in his official capacity, where there is a conviction, and regardless of the solvency or insolvency of the defendants.

The expression fees "*received*" from the county of Pitt does not necessarily mean the half fees which were paid by the county because of the insolvency of the defendants, but rather all fees received from criminal prosecutions in the county or from such business in the county. The word "receive" does not always carry with it the meaning that something has been given in payment of an obligation. It is not infrequently used as signifying merely the place from which or the person from whom the money or the thing which is transferred from one to another has come, and the context of this act shows that to be the meaning of the word as therein employed. A person may receive a thing in many ways not implying a payment or an obligation to pay. If the Legislature had intended otherwise it would have been quite easy to express its meaning in a few and simple words. It would naturally have qualified the word "fees" by the adjective *half*, so as to confine it to half fees or the word "convictions," by limiting its scope to those cases in which the defendants were insolvent. It had carefully done so in all prior enactments relating to this subject. The statute creating the recorder's court invests it with a very broad jurisdiction, embracing nearly every offense, except capital felonies and felonies of the higher grade, known to the law, and those of usual occurrence in our State. It was supposed, therefore, that the returns of the solicitor from criminal business in that county would be *considerably* lessened, and so much so that it would be better to allow him a sum *in solido* in lieu of fees to compensate him for this loss.

It must be true that if the intent was to refer solely to fees coming to the solicitor in insolvent cases, the Legislature would have made it clear by limiting the words of the statute, in their application, to that class of fees, there being two kinds, and not have amplified the language so as to embrace fees in cases of both kinds. The plain meaning of the act is that the six hundred dollars is to be paid by the county in lieu of fees which, but for this provision of the law, would have been received by the solicitor from all criminal cases in the county if convictions were obtained, and whether the defendants were solvent or not, and this we hold to be the correct interpretation of the statute. Nor do we think that the omission to expressly direct that all fees

thereafter accrued in criminal cases, where the defendants are solvent, and which the solicitor would otherwise get, should be taxed in the costs and paid to the county, can be permitted to change this meaning. As the lump sum is to be paid in place of the fees by the county, there is a necessary implication that the latter shall be turned into the county treasury to increase its general fund, for as it was not provided that the solicitor should have them, being paid a certain sum in lieu thereof, in the absence of any special application of them to some other purpose, they should go to the county which has furnished the money to commute them, and we cannot infer that they must go to the person who has received the commutation allowance.

Any possible inference as to the true meaning of the act, to be drawn from this omission of any express direction that the fees be paid to the county, is more than rebutted by the plain words of the Legislature in declaring its purpose. The entire framework of the act, when considered with proper reference to other related legislation, so plainly and completely embodies this idea that it is impossible to give the statute any other construction, but we do not by any means intend to imply that there was not justifiable ground for a division of opinion in regard to its terms and a consequent disagreement as to its meaning, and it was entirely proper and very seemly, therefore, that the matter should have been submitted to us for final settlement, and thereby close a controversy distasteful to both parties.

In order to exclude an inference that may possibly be drawn from the opinion in regard to the statements of the Senator and Representatives on the one side and the solicitor on the other, we will add that we have not considered them at all, as it is not within our province or jurisdiction to construe statutes by such extraneous matter. Even if the collective intention of the members of both legislative bodies had been shown by proof, we could not consider it, as an unexpressed intention passes for nothing in such cases. We must interpret the meaning by what is said and not by what was intended to be said, but not expressed. If we should attach any importance to such extrinsic proof of the intention, statutory law would depend upon uncertain and almost unprovable intentions, instead of being based upon the written word. It is so with contracts, and must more surely be so with constitutions and statutes. Authorities that sustain this position are not hard to find.

This Court said in *S. v. Partlow,* 91 N. C., 550, 552: "The meaning (of the Legislature) must be ascertained from the statute itself, and the means and signs to which, as appears upon its face, it has reference. It cannot be proved by a member of the Legislature or other person, whether interested in its enactment or not. A statute is an act of the

Legislature as an organized body. It expresses the collective will of that body, and no single member of it, or all the members as individuals, can be heard to say what the meaning of the statute is. It must speak for and be construed by itself, by the means and signs indicated above. Otherwise, each individual might attribute to it a different meaning, and thus the legislative will and meaning be lost sight of. Whatever may be the views and purposes of those who procure the enactment of a statute, the Legislature contemplates that its intention shall be ascertained from its words as embodied in it. And courts are not at liberty to accept the understanding of any individual as to the legislative intent." Citing *S. v. Boon*, 1 N. C., 103; *Drake v. Drake*, 15 N. C., 110; *Adams v. Turrentine*, 30 N. C., 147; *S. v. Melton*, 44 N. C., 49; *Blue v. McDuffie, ibid.*, 131; Potter's Dwarris on Statutes, 179 *et seq.* Besides, it is not necessary that we should attach any significance to the statements, as the act is plainly worded and speaks for itself, without any external aid, except other cognate statutes.

We have, therefore, reached the conclusion that the solicitor is entitled only to the salary in lieu of fees for convictions in all criminal cases he prosecutes in the county. Let the judgment upon the case agreed be reversed, with costs, and it will be so certified.

Reversed.

I. T. W. HOELL AND WIFE v. W. E. WHITE ET ALS.

(Filed 13 October, 1915.)

1. Judgment—Attorney and Client—Consent of Attorneys—Scope of Action—Pleadings.

Consent of the attorney alone to the entry of a judgment, given without the knowledge and consent of his client, which, in its scope, is outside of any matter set out in the pleadings, will not bind his client, a party to the action.

2. Same—Mortgages—Cancellation—Foreclosure.

An action to cancel a note secured by mortgage, on the ground of payment, and asking injunctive relief against foreclosure, under the power of sale contained in the mortgage, wherein the answer does not ask foreclosure by the court or set up a counterclaim or cross action, does not embrace within its scope the entry of a consent judgment of foreclosure, but postponing the sale, and it is necessary to the validity of such judgment that the consent of the party be obtained, and the consent of his attorney thereto is insufficient.

3. Judgments — Nonsuit — Mortgages — Findings of Jury — Payment — Foreclosure.

In this case it is held that a judgment of nonsuit granted by the court is only his finding that the evidence was insufficient to decree the cancellation of the mortgage, the subject of the action, and there being no finding by the jury upon the issue of payment, a decree of foreclosure was improperly entered against the plaintiff.

HOELL *v.* WHITE.

APPEAL by plaintiffs from *Connor, J.*, at the May Term, 1915, of CRAVEN.

This action was brought upon the allegation that the plaintiffs' land (40 acres) had been advertised for sale under a mortgage upon which there was nothing due, because the plaintiffs had been induced to sign a deed for 4 acres and a brick plant upon an agreement to cancel the notes and mortgage, and asking for a restraining order against the sale and a decree that the notes and mortgage executed by the plaintiffs should be canceled of record. Upon the close of the evidence the court sustained the motion of the defendants for a nonsuit. When the judgment was tendered, the attorneys for the plaintiffs being in court, the judge stated that if said attorneys felt it their duty to appeal he would sign the judgment tendered, which was in the usual form, but that if the appeal was taken in order to have the sale of the land postponed to the fall merely, the judge would secure the consent of the defendants that the sale should be postponed till then, and that it should then be made under the decree of the court and not under the power of sale in the mortgage. The plaintiffs' counsel assented to that arrangement, and the judge, after securing the consent of defendants, directed that the judgment be drawn out accordingly, and the same being approved by the attorneys for the plaintiffs, signed the same, and they were in court when said judgment was signed, though the plaintiffs themselves were not. Later in the term one of the attorneys for plaintiffs announced in open court that the *feme* plaintiff was not satisfied with the judgment and wished to have the same stricken out and set aside. This the judge refused to do. The counsel who had acted for the plaintiffs up to that time were permitted to withdraw from the case. The *feme* plaintiff was at that time in court, and no exception was taken to the refusal to set aside the judgment and no notice of appeal was given.

The plaintiffs, through their present counsel, served a case on appeal upon the counsel for the defendants, who served exceptions to this case on appeal upon the new attorney for the plaintiffs. In the case on appeal as served by the plaintiffs it was stated: "It is not the purpose of this appeal to reverse the judgment as to nonsuit," but the plaintiffs insist that the only judgment that should have been rendered was that of nonsuit under the Hinsdale Act.

The exceptions by the plaintiffs are that so much of the judgment as held defendants' mortgage good and valid and directed a sale of the 40-acre tract by a commissioner under decree of foreclosure was foreign to the cause of action set out in the complaint, and further, that so much of the judgment as orders the plaintiffs to make a deposit of $75 or file a bond with the clerk was error, in that they did not consent to such

judgment; and the plaintiffs further except to so much of the judgment as finds that the holder of the deed for 4 acres, executed by the plaintiffs to defendant White, had been delivered by said White to the court, testifying that the same had been in his hands since the execution, and had not been in the hands of defendant White.

A. D. Ward for plaintiffs.
Moore & Dunn for defendants.

CLARK, C. J. Foreclosure by the court was not asked for in the answer, and there was no counterclaim or cross action set out against the plaintiffs. While a party is entitled to any relief justified by his pleadings and proof, whether a prayer to that effect is made or not, there must be *allegata* and proof to justify the judgment rendered. While courts go far to sustain judgments taken in ordinary course, with the assent of counsel, there cannot be a consent judgment entered by counsel without the knowledge or consent of the client, which in its scope is outside of any matter set out in the pleadings. This is recognized in *Hairston v. Garwood*, 123 N. C., 345.

In this case there was no pleading which justified a decree of foreclosure against the plaintiffs, and without her consent there could be no judgment agreed to by her counsel to that effect. Besides, there has been no jury finding on the issue raised by the pleadings, whether the mortgage note has been paid. Without that there could be no judgment of foreclosure. The nonsuit by the judge was simply his finding that a case was not made out by the evidence offered for plaintiffs for cancellation. It does not justify an order for foreclosure against the plaintiff.

The judgment entered for a nonsuit under the Hinslale Act is not appealed from, but the additional entries to which the plaintiff excepted were erroneous, and must be stricken out.

Reversed.

J. W. GRIFFIN ET ALS. *v.* BOARD OF COMMISSIONERS OF MOSELEY CREEK DRAINAGE DISTRICT.

(Filed 13 October, 1915.)

1. Drainage Districts—Interpretation of Statutes—Water and Water-Courses—Reports of Viewers—Conformity—Drainage Commissioners.

Where a drainage district has been laid out in accordance with the requirements of the Drainage Act, and the final report has been filed and recorded, provision is made for the selection of a board of drainage commissioners, etc., who are charged with the duties of carrying out, substantially, the plans and specifications of the report as recorded, their powers being largely ministerial in character, to make out the assessment rolls constituting a lien on the property, as in case of tax lists, ob-

serving the classifications and ratio of assessments determined upon by the board of viewers; and the modification made by section 4 of the act contemplates only such minor charges of detail as may occur in carrying out the plans, etc., specified in the final report, and not a substantial departure therefrom.

2. Same—Courts—Rights of Landowners—Laches.

The courts, in proper instances, have the power to interfere and stay amounts assessed against the owner of lands within an established drainage district, when it appears that the commissioners, in carrying out the ministerial duties imposed on them, endeavor to collect from him a sum in excess of their own assessment, or that they had made out these rolls in utter disregard to the classifications and ratio of assessments established by the final report, or they had made such changes in the plans and specifications thereof as to exceed their powers and work substantial wrong and hardship upon a landowner, if he is not guilty of laches and has not unduly delayed asserting his rights.

3. Drainage Districts—Interpretation of Statutes—Reports—Objections—Landowners—Expectations.

Where a drainage district has been duly laid off in conformity with the statute, and a landowner therein has not excepted to either the preliminary or final report, he may not after the appointment of the commissioners, be heard to complain that the benefits he is to receive are not as great as those he had contemplated.

4. Same—Bond Issues—Injunction—Rights Against Commissioners.

Where a drainage district has been fully and lawfully established in accordance with the statute, and the commissioners duly appointed and bonds issued in furtherance of the scheme, an injunction restraining the collection of the assessment against the landowners therein, at the suit of one of them, will not issue, as against the interest of the holder of the bonds, unless it clearly appears that the commissioners have substantially departed, to the injury of the claimant, from the scheme set forth in the final report of the viewers, etc.; and it appearing in this case that such has not been done, the restraining order is properly dissolved, and the further order that the plaintiff may proceed in his action against the commissioners is approved.

5. Drainage Districts—Interpretation of Statutes—Reports—Record—Notice—Objections—Laches.

Upon the filing of the final report by the viewers, etc., in a proceeding to establish a drainage district under the provisions of the statute, a record is required by the statute to be kept in a book for the purpose, giving all interested in the proceedings notice of all that has been done materially affecting them; and when they have failed to make objection within three years, *semble*, they have lost their right to object, by the delay.

APPEAL by plaintiffs from *Connor, J.*, at the April Term, 1915, of CRAVEN.

Civil action, heard on motion to dissolve a preliminary restraining order.

The action was to compel commissioners of drainage district to complete and carry out the scheme of drainage so as to afford the benefits to plaintiffs' land as contemplated in the establishment of the district and, in the meantime, to restrain the collection of the assessment laid

by the drainage commissioners to pay the accumulated interest on the bonds issued for cost and maintenance, etc.

On the hearing it was made to appear that the district had been established on petition regularly filed; that preliminary and final reports had been approved; drainage commissioners appointed; bonds to the amount of $45,000 issued; an assessment made to pay the accumulated interest thereon, which the commissioners were proceeding to have collected for the purpose, as provided by the statute, etc.

There was evidence, also, on the part of plaintiffs that, in carrying out the scheme of drainage provided for, the commissioners had failed to extend the same so as to afford any benefit to plaintiffs' land, and further, they made some alterations in one of the lateral ditches, and allowed one R. A. Richardson to maintain a dam on his lands lying adjacent to and below the lands of plaintiffs, thus preventing a proper drainage of plaintiffs' lands, contrary to the scheme and plan adopted and contained in the final report of the viewers and confirmed by the court.

To these allegations defendants offered affidavits making averment that the commissioners were carrying out the plans as contemplated and provided for in the report of the board of viewers.

Further, that no alterations were made in the canal as established, except to make same more efficient, and these fully within the discretionary powers conferred upon them by the law, and any minor changes made by them they had acted on their best judgment and under the advice and direction of a competent engineer, and that they thereby increased the efficiency of the general plan and afforded better drainage to the lands and without increasing the cost and estimates shown on the final reports.

His Honor, on consideration of the facts in evidence, entered judgment dissolving the restraining order "for the purposes of suffering and permitting the collection of the assessments, and continued the cause for such other and further relief as the plaintiffs may show themselves entitled to."

Plaintiffs excepted and appealed.

Moore & Dunn, G. V. Cowper for plaintiffs.
Guion & Guion for defendants.

HOKE, J., after stating the case: There have been several of the more recent decisions of the Court upholding the validity of these drainage laws, chapter 67, Laws 1911; chapter 442, Laws 1909, and chapter 88, Revisal of 1905, and dealing to some extent with the effect and procedure under them. *Drainage Commissioners v. Farm Association,* 165 N. C., p. 697; *Drainage Commissioners v. Engineering Co.,* 165 N. C., p. 37; *Shelton v. White,* 163 N. C., p. 90; *Newby v. Drainage District,*

163 N. C., p. 24; *In re Drainage District,* 162 N. C., p. 127; *White v. Lane,* 153 N. C., p. 14; *Sanderlin v. Luken,* 152 N. C., p. 739.

From a perusal of these cases on the procedure required for the proper formation of the district, notably that of *Shelton v. White, supra,* it will appear that the proceedings may be instituted by a majority in number or by the owners of three-fifths of the land in a given area, and on their petition filed before the clerk a board of viewers shall be appointed, to consist of two resident freeholders of the county, and a competent civil and drainage engineer, this last to be on the recommendation of the State Geologist, who shall go upon the land, make careful examination of the same, and report on the general feasibility of the scheme, etc. On the coming in of this report and the settlement of objections thereto, for making of which notice and opportunity is provided, if the scheme is approved, the drainage district is established and the board of viewers are then directed to make a second and more extended report, based on a complete survey of the land, marking out the course of the main and all lateral ditches, levees, etc., giving a description of each owner's land, etc., etc., and they shall file with this report a drainage map of the district, showing "the location of the ditch or ditches and other improvements, and the boundary, as closely as may be determined by the records of the lands owned by each individual landowner within the district. The location of any railroads or public highways, and the boundary of any incorporated towns or villages within the district, shall be shown on the map. There shall be also prepared to accompany this map a profile of each levee, drain or water-course, showing the surface of the ground, the bottom or grade of the proposed improvement, and the number of cubic yards of excavation or fill in each mile or fraction thereof, and the total yards in the proposed improvement and the estimated cost thereof, and plans and specifications, and the cost of any other work required to be done." Laws 1909, ch. 224, sec. 10.

The second report shall also contain a classification of the lands and a rate of assessment for the same, as directed in section 12 of the act.

On the coming in of this second report, notice and opportunity for objection is again provided for, and, when the objections have been adjusted and settled pursuant to the law, the proceedings are all recorded in a special book, called the drainage record, and the maps thereof filed in the office and one of these pasted or otherwise attached to the record book, thus giving to every one interested full opportunity to observe and note in detail the scheme and plans for carrying out the undertaking.

It may be well to note, also, that in *Shelton v. White, supra,* it was held, that while the individual or minority landowner could present his

objection and have the matter determined in respect to either the preliminary or completed report, the issue as to him is confined to the effect upon his own land, and if the material question involved is decided in his favor, and it is found that his land was in no wise benefited, the court has the power either to exclude his land from the drainage district or, if it was found necessary to retain it in order to the success of the scheme, it could be retained and the owner compensated in damages for any injury done, ample provision being made in the law for such a course (Laws 1909, sec. 11); and further, that a majority in number of the landowners or three-fifths in the amount of land, could, even to the second report, by their exceptions, taken in apt time, raise and maintain objections to the validity of the entire scheme.

When the final report is filed and recorded provision is made for the selection of a board of drainage commissioners, and for the appointment of a superintendent of construction, and from a careful perusal of the statute it will appear that these officers are charged with the duty of carrying out, substantially, the plans and specifications of the report as recorded, and that their powers in the premises are largely ministerial in character. They make out the assessment rolls, which are constituted a lien on the property, as in case of tax lists, observing the classification and ratio of assessment determined upon by the board of viewers.

True, under the provision of section 4 of the act the drainage commissioners are given "power to correct errors and modify the report of the details of the report of the engineer and viewer if, in their judgment, they can increase the efficiency of the drainage plan and afford better drainage to the lands of the district without increasing the estimated cost submitted by the engineer and viewers and confirmed by the court," but this modification of the former law only contemplates such minor changes of "detail" as not infrequently occur in the practical carrying out of plans which have been indicated in a careful survey, and does not, as stated, and was not intended to authorize substantial departure from the plans as contained in the final report of the board of viewers.

The careful and minute provisions of the statute in reference to the final report, requiring that the course of the main and all lateral canals and ditches shall be carefully marked out, the boundaries of the lands given, the levels ascertained and stated, and both surface and profile maps made and recorded, and the restricted terms in which the power to alter it is given to the drainage board to "correct errors and modify details," affords convincing evidence that, by correct interpretation, this final report of the board of viewers is the controlling chart by which the drainage commissioners are to be guided in constructing the work

and making out the assessment rolls under the law. And if, in a suit of this character, it should be clearly made to appear that the commissioners of drainage, in carrying out the ministerial duties imposed upon them, should endeavor to collect of the landowners sums in excess of their own assessment, or that they had made out these rolls in utter disregard of the classification and ratio of assessment established by the report, or that they had made such changes in the plans and specifications of the final report as to exceed their powers in the premises and work substantial wrong and hardship upon the individual members of the district, in either case, the complainant being free from laches or undue delay, the court would have the right to interfere and stay the collection of the amounts until a proper assessment could be established. But, when the commissioners, adhering substantially to the plans and specifications of the report, have made assessments contemplated and authorized by the law, then collection should not be stayed because the scheme has not afforded to a landowner the drainage he had anticipated. That was a question that was settled at the time the report was adopted and the district established, and may not be again questioned in a proceeding of this character. Nor will the creditor be hindered in the present collection of his debt, otherwise properly assessed, because the drainage commissioners, in breach of these duties under the law, have failed to do their work efficiently or to properly open and construct the drains, since a default of that kind must be corrected by proper action between the members and the commissioners, a course still open to plaintiff on the record, if the necessary facts are ultimately established.

This being, to our mind, the proper construction of our drainage statutes, and it is in accord with decisions on the subject here and elsewhere interpreting laws of similar import, *Newby v. Commissioners,* 163 N. C., *supra; White v. Lane,* 153 N. C., p. 14; *Hartwell Drainage District v. Mickelberry,* 257 Ill., 509; *Kelly, Exr., v. Drainage District,* 157 Iowa, 735; *Fardell Drainage District v. Board of Supervisors,* 157 Iowa, 590, we are of opinion that the court below made correct decision in dissolving the injunction order restraining collection of the assessments and leaving the action to proceed as between the landowners, plaintiffs, and the drainage commissioners. In the present case the plaintiffs base their right to relief:

1. On the ground that the drainage commissioners have not properly carried out the drainage scheme, and that the work done has afforded plaintiffs' land no substantial benefit.

2. That they have made departure from the plans and specifications of the board of viewers, to plaintiffs' injury.

As we have endeavored to show, the first ground may not be asserted against regular assessment to pay the bondholders. And, on careful

consideration of the pleadings and affidavits, we are unable to discover that the drainage commissioners have made such substantial departure from the plans and specifications of the board of viewers as to render their assessment void. Apart from this, it appears that the assessments which the commissioners are now seeking to collect, purporting to be in pursuance of authority vested in them by law and the terms of the decrees in the cause have been made and filed with the clerk of the Superior Court since 1911, and that no legal objection has been made thereto by plaintiffs or any one else until the commencement of the present suit in 1914, and it would seem that plaintiffs have thereby waived the right to object to the assessments in so far as the creditor is concerned.

We find no error in the judgment of the court, and the same is in all respects

Affirmed.

W. A. BUNN v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 13 October, 1915.)

1. Master and Servant—Duty of Master—Negligence—Safety of Employee—Ordinary Tools and Methods—Anticipation of Injury.

The requirements that the master, in the exercise of ordinary care, should provide for his servant a reasonably safe place to work, and furnish him with tools and appliances safe and suitable for the work in which he is engaged, chiefly apply in case of machinery more or less complicated, and more especially when driven by mechanical power, and not always to the use of everyday tools or to ordinary everyday conditions requiring no special care, preparation or prevision, where the defects are readily observable, and there is no reason to suppose that the injury complained of would result.

2. Same—Railroads—Repairing Cars—Inspection.

Where, in an action by an employee of a railroad company to recover damages for a personal injury, the evidence tended only to show that the plaintiff and another contracted by piece work to repair cars marked for repair by the defendant's inspector, without supervision by the defendant; that the plaintiff and his coemployee were skilled and experienced in that kind of work; that they were to replace rotten parts of or certain timbers of the car and had loosened the weather-boarding on one side thereof, and this side fell upon the plaintiff and injured him when he was taking out the last nails and when his coemployee had gone to get hands to lift down the side of the car, by reason of some rotten uprights holding the car sides, which had not been discovered: *Held*, a judgment of nonsuit was proper, no evidence of actionable negligence having been shown, the defects complained of being more readily discoverable by the plaintiff, and not within the reasonable anticipation of the defendant.

3. Same—Nonsuit.

In this case, it appearing that the plaintiff has shown no evidence of actionable negligence on the part of the defendant railroad for an injury received by the side of the car which he, an experienced workman, was

working on, falling upon him, it is further held that the plaintiff's contention is unavailing, upon the question of nonsuit, that he would have been in a position to have avoided the injury except for débris left there about 18 inches high from the ground, it appearing that the débris was usually removed by the defendant's employees after the cars had been repaired, or in cleaning up the yard, and requested in this instance only for the purpose of putting a new sill in the car, and not as a matter of plaintiff's safety; and that the injury would not thereby have been prevented under the surrounding conditions, had the débris been removed, or that its presence or absence would naturally increase the danger or avoid the injury, if the work had been done in a proper way or with reasonable care.

4. Railroads—Master and Servant—Contributory Negligence—Damages.

Under our statute, Laws of 1913, chapter 6, the question of contributory negligence, in an action by an employee of a railroad against the company to recover damages for a personal injury, is only significant on the issue of damages, and does not afford the defendant a complete defense.

APPEAL by both parties from *Carter, J.*, at the June Term, 1915, of EDGECOMBE.

Civil action to recover damages for personal injuries caused by alleged negligence of defendant company.

The facts in evidence tended to show that, in June, 1913, while plaintiff and another mechanic associated with him in the work, one V. C. Daniel, were engaged in repairing a box car on a repair track in South Rocky Mount, the side of the car where plaintiff was then at work fell over on him, causing serious and permanent injuries; that plaintiff and McDaniel were both experienced men, who had done quite an amount of work of this kind, and where doing this as employees of the company by the piece or contract; that the ordinary methods of procedure in doing this work was that an inspector, in this case one J. G. Armstrong, looked over the car and marked the parts that he condemned, and the plaintiffs or other workmen similarly engaged were then given the work to do and were left to do it in their own way, without further supervision or inspection so far as the methods of the work were concerned.

In case of the present car, the inspector condemned different parts of the car, and, among other things, told plaintiff and his associate to remove the top, and marked one of the side sills at one place with a chalk mark, indicating that same was to be spliced, and on the other side, having bared the sill at the end and also near the door and discovered it was rotten, marked it at each end to indicate that it was condemned and was to be entirely removed. The inspector gave directions that both sides of the car were to be saved, because they were good, plaintiff testifying at one place that the inspector said to save this side if they could. The witness V. C. McDaniel, testifying for plaintiff, said that during the progress of the work he discovered that the ends of the car were rotten, and he sent for the inspector about this, and was told to

take the ends out also; that the plaintiff and his associate entered on the work, removed the top and ends of the car, prepared the splice for the sill on one side, plaintiff helping McDaniel in this and McDaniel, about 3 o'clock p. m. on Tuesday, the second day of their work, started to the mill to get hands sufficient to help let down the side of the car on which plaintiff had been working, that being the side where the entire sill was to be removed and, meantime, plaintiff resumed and continued on the work of back-setting the nails at the base of the car, which held the weatherboarding to the sill, this being done by driving the nail with a punch through into the sill and thus loosening the weatherboarding, this being done so that when McDaniel returned with the hands, they could lay the side over on the body of the car; that plaintiff had about completed this particular work or done the better portion of it and, coming to a nail that had not been entirely driven up, but had been bent around the weatherboarding in some way, and plaintiff prized the weatherboarding loose where the bent nail was and, as he did so, it gave way and the side of the car fell over on plaintiff, causing the injuries as stated; that plaintiff was sitting down at the time, the rubbish or débris thrown out in the progress of the work being along and around the car and making this the more convenient position in which to do this part of the work.

It further appeared that this rubbish, as it was torn away, was lying around the car, being at the point where plaintiff was working, 12 to 18 inches in depth, and plaintiff testified that, but for this rubbish, he would have been standing while he worked and, though bent over some, was satisfied that he could have escaped but for this rubbish; that the base line of the car, where the nails were being driven in, was three feet from the ground, and he could have done the work very slightly bent.

McDaniel testified that the base line was below the plaintiff's knees, and he didn't see how plaintiff could have escaped in any event. It was also shown that there was a gang of hands around there whose duty it was to clear off the yards, usually, after the work was done; that at dinner time on Tuesday, the second day of the work, McDaniel told the foreman of this gang to have the rubbish removed, giving as a reason that they would have to repair the sill alongside of the car, and the foreman replied that he would get to it as soon as he could, but just then he had no racks or proper place ready for it.

Both plaintiff and McDaniel testified that the cause of the car falling when it did was that the standards of the car, the upright posts mortised into this sill, were also rotten at the ends, and that, notwithstanding the weatherboarding had been loosened at the bottom and the sill was rotten, that the side of the car would have held if these standards had not been also rotten.

In apt time there was motion to nonsuit by defendant; motion overruled and defendant excepted.

The court was also asked to instruct the jury that, upon the entire testimony, if believed and accepted by the jury, this issue as to defendant's negligence should be answered "No." Refused, and defendant excepted.

The court, ruling that there was no negligence shown by reason of any conduct of the inspector, Armstrong, submitted the case to the jury on the question of negligence by reason of failure to clear away the rubbish. Verdict and judgment for plaintiff and defendant excepted and appealed.

H. A. Gilliam, J. H. Pou for plaintiff.
F. S. Spruill for defendant. } *Defendant's appeal.*

H. A. Gilliam, J. H. Pou, J. M. Norfleet, J. W. Keel for plaintiff.
F. S. Spruill for defendant. } *Plaintiff's appeal.*

HOKE, J., after stating the case: We have carefully considered the case presented in the record, and are of opinion that no actionable wrong has been established against defendant company. In several recent decisions of the Court it has been held that, while an employer is required, in the exercise of ordinary care, to provide for his employee a reasonably safe place to work, and furnish him with tools and appliances safe and suitable for the work in which he is engaged, the principle is chiefly insistent in case of "machinery more or less complicated, and more especially when driven by mechanical power," and does not always apply to "the use of ordinary everyday tools, nor to ordinary everyday conditions requiring no special care, preparation or prevision, where the defects are readily observable, and where there was no good reason to suppose that the injury complained of would result." *House v. R. R.*, 152 N. C., p. 397; *Mercer v. R. R.*, 154 N. C., p. 399; *Simpson v. R. R.*, 154 N. C., p. 51; *Rumbley v. R. R.*, 153 N. C., p. 457; *Brookshire v. Electric Co.*, 152 N. C., p. 669; *Dunn v. R. R.*, 151 N. C., p. 313; *Martin v. Manufacturing Co.*, 128 N. C., p. 264.

In the present case there was nothing specially complicated or threatening in the work that these employees were given to do: the taking out the sides and making the indicated repairs to an ordinary box car, stationary and in proper position on the repair track. True, the car had been inspected by another employee of the company, one J. G. Armstrong, but this was with a view of ascertaining the extent of the repairs required and the amount of work to be done by the company, and there is nothing in the testimony or attendant circumstances which shows or tends to show that the examination had any reference or natu-

ral connection with the safety of employees to be engaged in the work. On the contrary, it appears that the inspector, having given directions that the top of the car should be removed and a sill spliced on one side and entirely removed on the other because it was rotten, plaintiff and another, two experienced men who had done much work of this character, were sent to make the needed repairs. They were left entirely to their own methods and were in much better position to ascertain the true condition of the car than any one connected with it. See *Lane v. R. R.*, 154 N. C., p. 91; and *White v. Power Co.*, 151 N. C., p. 356. In confirmation of this view, we find from the evidence that McDaniel, plaintiff's associate, having ascertained, in the progress of the work, that the ends of the car were also rotten, notified the inspector of that fact, and was directed to remove the ends, which was done. And so, in reference to the débris or rubbish lying near and around the car, and on which the plaintiff was sitting when he was injured, there is nothing in the evidence to show that its presence or absence would naturally increase the danger or was likely to cause an injury in case the work was done in a proper way and with reasonable care.

True, there was a gang of hands there, charged with the duty of removing rubbish, but this was with the general purpose of keeping the yard clear, and was usually done when the job was completed, and there is nothing to show that the duty of removing the rubbish had any tendency to increase or diminish the ordinary hazard of the work when properly done. Accordingly, we find that when McDaniel told the foreman of the said gang, on Tuesday at midday, to remove the rubbish, he gave as his reason that they needed a place to prepare the new sill. It was not at all with any view of making the work any more safe. If this rubbish had been removed, the plaintiff would have been then necessarily bent over doing his work, and there is evidence to show that in all probability he would have been injured whether the rubbish had been removed or not. But we are not condemning the conduct of plaintiff as tending to establish the fact of contributory negligence on his part. In that case, the question under our present statute, Laws 1913, ch. 6, is only significant on the issue of damages, but, under the authorities cited, we must hold that the case is properly made to rest on the proposition that, in the case of a box car, stationary on the yard, with two experienced and capable workmen sent to repair it, as indicated in the testimony, these employees being left entirely to their own methods of doing the work and with present power to call for any help that might be required, there was nothing to show that any injury to these men or either of them was likely to occur, and, therefore, no breach of legal duty on the part of the company that could be fairly considered as the proximate cause of plaintiff's hurt.

The case in our reports more nearly resembling the one we are considering is that of *Rumbley v. R. R., supra.* In *Rumbley's case* the facts apposite and the decision thereon are stated in the opinion of the Court as follows: "We fail to perceive any ground upon which this recovery can be sustained. The evidence tended to show that on 23 June, 1908, plaintiff and another carpenter were directed to tear down an old shed, near the Salisbury depot, and had been engaged on the work several days, and on the day in question they were knocking the rafters loose and standing on one of the joists of the shed, which were placed horizontally beneath, at intervals of two or three feet. While plaintiff was standing on one of these joists, knocking loose the rafters above, it gave way and fell to the ground, causing the injury complained of. The cause of the joist giving way is not very definitely described, but it seems to have been very insecurely fastened at the ends. The work that plaintiff was given to do was simple in operation, well within his experience and training, and he was left to select his own methods of doing it. On the facts in evidence, there has been no breach of legal duty established on the part of defendant company, and under several recent decisions of this Court the motion for nonsuit should have been allowed. *House v. R. R.,* 152 N. C., p. 398; *Brookshire v. Electric Co.,* 152 N. C., p. 669; *Dunn v. R. R.,* 151 N. C., p. 313."

We regard this case and the principle upon which it rests as decisive of the present appeal, and are of opinion that the motion for nonsuit should have been allowed.

Reversed.

PLAINTIFF'S APPEAL.

HOKE, J. In this case, the court below, being of opinion that there was no negligence imputable to the company in reference to the conduct of the inspector, Armstrong, made several rulings in furtherance of that position, to which plaintiff excepted and appealed from the judgment as rendered. Having held, on defendant's appeal, that plaintiff was not entitled to recover in any aspect of the testimony, the specified rulings of his Honor adverse to plaintiff have become immaterial, and the judgment is, therefore, affirmed.

No error.

W. S. WILSON v. S. H. SCARBORO AND WIFE.

(Filed 20 October, 1915.)

1. Contracts—Breach—Timber—Evidence—Measure of Damages—Lumber—Market Value.

In an action to recover damages for a breach of contract whereby the plaintiff was prevented from cutting the timber contracted for on the defendant's land, it is competent, upon the issue as to the measure of damages, for the plaintiff to show the market value of lumber in that locality as a basis for showing his loss after deducting the cost of manufacture, etc.

2. Same—Particular Sales—Corroborative Evidence.

Where, upon the issue as to the measure of damages arising from a breach of contract in the sale of timber, evidence of the market value of lumber in that locality is relevant and competent, it is permissible to show prices obtained for particular sales of lumber, for such, in the aggregate, show the market value thereof; and evidence of particular sales is especially competent when corroborative of testimony of the market value of the lumber at the time and place.

3. Appeal and Error—Objections and Exceptions — Evidence — Unanswered Questions—Contracts—Breach—Damages—Diminution.

Where exception is taken to ruling out questions asked a witness on the trial, it must in some way appear what the answers of the witness sought to be elicited would have been, so that the Supreme Court may see wherein the appellant has been prejudiced; and while in this action to recover on a breach of contract the court recognizes and discusses the rule that the party injured is required to minimize his injury by the exercise of reasonable care, it is held that the appellant has not sufficiently shown by his evidence that he is entitled to its application.

APPEAL by defendant from *Daniels, J.*, at the April Term, 1915, of WAKE.

Civil action. This case was here before and is reported in 163 N. C., 380. We there ordered a new trial for errors committed below, and at the last trial issues only as to the damages were submitted to the jury, the following verdict having been returned:

1. What damages, if any, is the plaintiff entitled to recover of the defendants by reason of being prevented by the defendants from cutting the timber described in the complaint? Answer: "$1,700."

2. What damages, if any, are the defendants entitled to recover of the plaintiff on account of stumps cut too high, logs left by plaintiff upon the ground, and standing trees left standing by plaintiff upon his sawmill location, as alleged in the answer? Answer: "$100."

3. Did the plaintiff negligently cause the burning of defendants' woods, as alleged in the answer? Answer: "Yes."

4. Did the defendants, by their own negligence, contribute to the burning of the defendants' woods, as alleged in the reply? Answer: "No."

4. What damages, if any, are the defendants entitled to recover of the plaintiff on account of such burning? Answer: "$250."

Judgment was entered thereon for the plaintiff and the defendant appealed.

R. N. Simms, Armistead Jones & Son, W. H. Lyon, Jr., Douglass & Douglass for plaintiff.

Jones & Bailey for defendant.

WALKER, J., after stating the case: There are substantially but two questions presented on this appeal.

First. It was necessary for plaintiff to prove his damages by testimony as to the value of the timber which, by the wrongful conduct of the defendant, he was prevented from cutting on the land, under their contract, and in order to do so, among other pertinent evidence, he offered to show at what price lumber was selling in that market, and was permitted to do so over defendant's objection. We do not see why this was not competent and relevant. It tended to prove the value of the timber, and the certain profit he would have made if the defendant had not violated the contract. The ground of objection to this evidence, as stated in the brief, is that plaintiff should have been restricted to the market price and not allowed to speak of any particular sale or purchase by him at the time. But the market price is generally ascertained by prices received at collective sales in the ordinary course of business, and what was paid for the article in a sale is some evidence of value. It was held in *Small v. Pool,* 30 N. C., 47, that while the price given by the purchaser and that for which he sold the property do not conclusively fix the value or amount of damages for a breach of the contract of sale, "each was competent as *some* evidence of the value of the article sold at the respective times of the purchase and the sale, and as such the jury had a right to have it," citing *Clare v. Maynard,* 32 E. C., 713 (7 Carr. & P., 741), which was an action for damages for breach of warranty in the sale of a horse, the question being as to its value. *Chief Justice Denman* said: "As the warranty and the unsoundness are admitted on the record, the only question is the amount of the damages. The first item claimed is the loss on the value of the horse. I am of opinion that the amount of damages is what the horse would be worth if sound, deducting the price it sold for after the discovery of the unsoundness; and I think the price at which it was sold to the plaintiff is not conclusive as to its value, though I think it very strong evidence." And again: "There is a case of *Cox v. Walker,* now before the Court. It was tried at Kingston, and there a horse-dealer had sold the horse to a livery stable keeper, who sold it to Sir John Johnstone at a higher price. In all the law of the world, I believe this is a new point. My

view of it is, that the fair value of the horse, if sound, is the measure of the damages, and that the sum the plaintiff gave is only the evidence of the value. The case of *Curtis v. Hannay*, 3 Esp., 82, bears on the present." It was also held that plaintiff could not recover ten pounds, which he had lost on a resale at a price equal to that amount over and above the original price, it being merely the loss of a good bargain. Cases in this Court recognizing the same rule as to value are *Boggan v. Horne*, 97 N. C., 268; *McPeters v. Ray*, 85 N. C., 462, and *Perry v. Insurance Co.*, 137 N. C., 403, which cites *Boggan v. Horne, supra;* 1 Elliott on Ev., sec. 182.

The right to recover damages of a prospective nature in cases of this kind, and the limitations upon it, are discussed fully by *Justice Hoke* in *Wilkinson v. Dunbar*, 149 N. C., 20. But this case is more like *McPeters v. Ray, supra*, for here the witness first testified as to the market value before stating at what price he had several times in 1910 bought and sold the same kind of timber and lumber. This was properly admitted as some evidence in confirmation of his opinion as to the market price.

But defendant further urges that the plaintiff should have diminished the loss by the exercise of proper care after he was apprised of the breach by the defendant of the contract, and should have bought other lumber or timber for his purpose. This is a familiar doctrine, but there is some variety in the statement of it. Compensation for a wrong is limited to such consequences as the injured party could not have avoided by reasonable care or diligence. All other consequences are regarded as remote, the rule being the same in cases of contract and those of tort. The injured party's own negligence or willful fault in failing to take reasonable precautions to prevent or reduce the damage, after notice of defendant's wrong, is regarded as the proximate cause of such injuries as could have in this way been avoided.

Courts frequently speak of the duty to make the damages as light as possible, but it is a duty only in the sense that compensation is denied for losses which might have been prevented by careful conduct on his part, and they are, therefore, said to be remote because the will or negligence of the injured party has intervened as a separate and independent cause producing them. Hale on Damages, p. 64 (29), and cases in note 86; *Loker v. Damon*, 17 Pick. (Mass.), 284; *Sutherland v. Wyer*, 67 Me., 64; *Sherman C. T. Co. v. Leonard*, 46 Kansas, 354; *Davis v. Fish*, 1 G. Greene (Iowa), 406; *Thompson v. Shattuck*, 2 Mile (Mass.), 615. The rule has been well considered and illustrated by apt examples in numerous decisions upon the subject, and the result of the cases, as summed up, may be thus stated.

If the party injured has it in his power to take measures by which his loss may be less aggravated, this will be expected of him. Thus, in

a contract of assurance, where the assured may be entitled to recover for a total loss, he, or the master employed by him, becomes the agent of the assurer to save and turn to the best account such of the property assured as can be preserved. The purchaser of perishable goods at auction fails to complete his contract. What shall be done? Shall the auctioneer leave the goods to perish, and throw the whole loss on the purchaser? That would be to aggravate it unreasonably and unnecessarily. It is his duty to sell them a second time, and, if they bring less, he may recover the difference, with commissions and other expenses of resale, from the first purchaser. If the party entitled to the benefit of a contract can protect himself from a loss arising from a breach, at a trifling expense or with reasonable exertions, he fails in social duty if he omits to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party liable. *Qui non prohibet, cum prohibere possit, jubet.* And he who has it in his power to prevent an injury to his neighbor and does not exercise it is often, in a moral if not in a legal point of view, accountable for it. The law will not permit him to throw a loss resulting from a damage to himself upon another, arising from causes for which the latter may be responsible, but which the party sustaining the damage by common prudence could have prevented. For example, a party contracts for a quantity of bricks to build a house, to be delivered at a given time, and engages masons and carpenters to go on with the work. The bricks are not delivered. If other bricks of an equal quality, and for the stipulated price, can be at once purchased on the spot, it would be unreasonable, by neglecting to make the purchase, to claim and receive of the delinquent party damages for the workmen left unemployed and the amount of rent which might be obtained for the house if it had been built. The party who is not chargeable with a violation of his contract should do the best he can in such cases; and, for any unavoidable loss occasioned by the failure of the other, he is justly entitled to a liberal and complete indemnity. The doctrine, as thus formulated, with the reasons for it, and hypothetical cases showing its practical application, will be found in an able opinion by *Judge Weston* in *Miller v. Mariners' Church,* 7 Me., 51. The injured party is required only to make reasonable and not extraordinary efforts to limit or restrict the resultant damage. We have recognized this principle in several of our cases. *Oldham v. Kerchner,* 79 N. C., 106 (*s. c.,* 81 N. C., 430); *Hassard-Short v. Hardison,* 114 N. C., 482; *Tillinghast v. Cotton Mills,* 143 N. C., 268; *Bowen v. King,* 146 N. C., 385; *Hocutt v. Telegraph Co.,* 147 N. C., 186; *Edwards v. Telegraph Co., ibid.,* 127; *Smith v. Telegraph Co.,* 167 N. C., 248. See, also, 13 Cyc., p. 71; *Wells v. Nat. L. Assn.,* 53 L. R. A., pp. 108, 109; *Lloyd v. Lloyd,* 60 Vt., 288; 8 A. and E. Enc. of Law,

605; 1 Sutherland on Damages, secs. 88, 89; 2 Joyce on Damages, sec. 1288. The rule is tersely stated in 8 A. and E. Enc. of Law, *supra:* "As it is the duty of a party injured by a breach of a contract, or a tort, to make reasonable effort to avoid damages therefrom, such damages as might by reasonable diligence on his part have been avoided are not to be regarded as the natural and probable result of the defendant's acts. There can be no recovery, therefore, for damages which might have been prevented by such reasonable efforts."

We do not think, though, that in this case defendant has properly shown what the answers of the witnesses to the question he propounded would have been. Their answers, if they had been given, might have been very disappointing and to such an extent as to be most unfavorable to the defendant, instead of helping out his defense. It has been often held that in such a case there will be no reversal, as we are unable to see that the proof would have been made if the question had been admitted, or that there was any prejudice to appellant by reason of the adverse ruling. *Wallace v. Barlow*, 165 N. C., 676; *Brinkley v. Railroad Co.*, 168 N. C., 428. There was no evidence that the plaintiff could have reduced the damages, or had a reasonable opportunity to do so, and the proof offered by the defendant did not tend, as we think, to show it, though we are left largely to mere conjecture as to what he could have proved, if anything, which the law regards as worthy of consideration by the jury; and it would also appear that plaintiff did the best he could under the circumstances. Unusual diligence was not required.

The charge of *Judge Daniels* was very fair to both parties and, as we view it, was entirely free from any fault. The verdict was not at all immoderate.

No error.

BETTIE LONG v. L. A. BYRD.

(Filed 20 October, 1915.)

Trials—Expression of Opinion—Vendor and Purchaser—Contracts—Breach of Warranty—Courts—Interpretation of Statutes.

In an action upon a check given for the purchase of a horse, the payment of which was in controversy, and defended upon the ground of a breach of warranty of the horse, a suggestion made by the trial judge, that a good way to test the truth of the matter would be for each party to select a man and drive the horse sufficiently to see what his condition was, is not an expression of opinion to the defendant's prejudice, as to whether the fact at issue was proven, and does not constitute error under the provisions of the Revisal, sec. 535.

APPEAL by defendant from *Peebles, J.*, at January Term, 1915, of DUPLIN.

This was an action on a check given for the purchase money of a horse. The issues submitted were:

1. Did the plaintiff warrant the mare to be sound, as alleged in the answer? Answer: "No."

2. If so, was there a breach of said warranty? Answer: "No."

3. Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: "Yes, $334.50."

This was the amount of the check and interest. The defendant had returned the horse to the plaintiff and the jury appended a note to their verdict that the horse was worth its feed.

H. D. Williams and George R. Ward for plaintiff.
Stevens & Beasley for the defendant.

CLARK, C. J. The only exception is that when a witness for the plaintiff testified as to the good condition of the horse in the respect in which it had been alleged to be defective, the judge suggested to the jurors that a good way to test the truth of the matter would be to let the plaintiff select one good man and the defendant another and drive the horse sufficiently to test what its condition was. The plaintiff was willing to the suggestion, but the defendant declined and assigned the suggestion of the judge as an expression of opinion. The jury found that the plaintiff did not warrant the horse and that there was no breach of the warranty.

If any one could have complained it was the plaintiff only upon the ground that the test suggested by the court was an intimation that there had been a warranty by the plaintiff.

Revisal, 535, originally ch. 452, Laws 1796, prohibits the judge from giving "an opinion whether a fact is fully or sufficiently proven." This the judge did not do. This Court has often called attention to the fact that it is not every remark of the court during the trial that will be construed a violation of this section. In *S. v. Angel,* 29 N. C., 27, *Ruffin, C. J.,* says: "The facts on which the statute restrains the judge from expressing an opinion to the jury are those respecting which the parties take issue or dispute and on which, as having occurred or not occurred, the imputed liability of the defendant depends." This is quoted in *S. v. Howard,* 129 N. C., 661, and many other cases are there cited to the same effect.

The jury found in response to the first issue that the plaintiff did not warrant the horse. If, therefore, the court had expressed any opinion as to the breach of the warranty it could not have been prejudicial, unless, as above stated, possibly as against the plaintiff. Besides, the remark of the court did not indicate whether the judge thought that there was or was not any breach. In fact, doubtless his Honor had neither information nor opinion in regard to the matter.

It could have done no harm if the court had refrained from making the suggestion, which was a wise and practical one, which the parties might well have resorted to before bringing an action. The judge suggested that it would be even then a good way to test the truth of the alleged defect in the horse to let each side select a good man to drive it sufficiently to ascertain the truth. Presumably these witnesses were later to come before the jury and give their testimony unless the parties were content to settle without further trial. In this there was no prejudice to either party apparent, and the judgment was properly entered upon the verdict.

In many cases the jury themselves have been permitted to go out to view the premises, *Jenkins v. R. R.*, 110 N. C., 441, citing *S. v. Gooch*, 94 N. C., 987; *Hampton v. R. R.*, 120 N. C., 539; *S. v. Perry*, 121 N. C., 535, and other cases. This is also authorized by express statute, Rev., 519 (3); *Kelly v. Lumber Co.*, 157 N. C., 178.

Children have been exhibited to the jury for comparison in cases of alleged paternity, *S. v. Horton*, 100 N. C., 443; *S. v. Woodruff*, 67 N. C., 89; weapons that have been used in committing an alleged crime have been exhibited to the jury, *S. v. Mordecai*, 68 N. C., 207. The fact that a witness was made to place his shoe in a track to identify it has been given in evidence, *S. v. Graham*, 74 N. C., 646; *S. v. Hunter*, 143 N. C., 610. In like manner wounds, models, diagrams, maps, photographs, and lately X-ray photographs have been admitted in the effort to find the truth.

In the present case the judge did not go that far, but merely suggested a method by which witnesses selected by each side would form an opinion as to the fact in controversy that might be satisfactory to the litigants and useful to the jury, if the result was accepted by the parties.

No error.

B. B. SCOTT v. GLENNIE HENDERSON AND WILLIE HENDERSON.

(Filed 20 October, 1915.)

Wills—Contingent Interests—Sales—Deeds and Conveyances—Estoppel—Reformation—Pleadings—Demurrer.

A devise of a one-half interest in lands to W. for life, then to his wife unless she should remarry, and in that case to B. for life and to his fourth generation, B. having a conveyance from the heirs and devisees of the testator other than W., to their interests in the land, executed a fee-simple deed to W., and after the death of W. and the remarriage of his wife, brought suit to recover the lands. *Held*, the contingent interests were subjects of sale and passed by the deed executed by B., the plaintiff, to W., which estops him from claiming such interests when there is no averment that his deed should be reformed for mistake or fraud; and where the complaint alleges the facts, as stated, a demurrer thereto should be sustained.

SCOTT *v.* HENDERSON.

APPEAL by defendant from *Connor, J.*, at the May Term, 1915, of CRAVEN.

Action to recover land. The complaint alleges that W. H. Scott, who was the owner of the land in controversy, died leaving a will in which he devised a one-half interest in said land to W. T. Scott "his lifetime, and then to his wife for her lifetime, unless she should be married again; then, in that case, the property will belong to my son, B. B. Scott, for his lifetime and to his fourth generation"; that W. T. Scott, the devisee, died and his widow, Glennie, who is a defendant, has intermarried with the other defendant, Willie Henderson; that the heirs and devisees of the said W. H. Scott, other than W. T. Scott, conveyed their interest in said land to the plaintiff, B. B. Scott, and that thereafter he executed a deed to the said W. T. Scott purporting to convey the land to him in fee simple. The defendant demurred to the complaint upon the ground that it did not state a cause of action. The demurrer was sustained and the plaintiff excepted and appealed.

W. D. McIver for plaintiff.
No counsel for defendant.

ALLEN, J. The plaintiff acquired a contingent remainder for life in one-half of the land in controversy under the will of his father, W. H. Scott, and he became the owner in fee of all other interests therein except those of W. T. Scott and his wife under the deed executed to him by the heirs and devisees of W. H. Scott. The contingent interest was the subject of sale and passed by the deed executed to W. T. Scott (*Kornegay v. Miller,* 137 N. C., 659; *Beason v. Amos,* 161 N. C., 359; *Hobgood v. Hobgood, ante,* 485), and, therefore, when the plaintiff executed his deed to W. T. Scott purporting to convey the land itself in fee, he parted with his title, and as these facts appear in the complaint, his Honor properly held that no cause of action was stated.

There is no allegation of mistake or fraud, and the plaintiff does not ask to have his deed corrected, and if the plaintiff should be permitted to recover he would have to do so in the face of his allegation that he has conveyed the land in fee, which he cannot do. *Weeks v. Wilkins,* 139 N. C., 217.

Affirmed.

JOSEPH LANG v. CAROLINA LAND AND DEVELOPMENT COMPANY ET AL.

(Filed 20 October, 1915.)

1. Drainage—Waters—Condemnation—Compensation—Constitutional Law.

While the importance of our drainage laws are fully recognized as affecting the interest of the public to the extent that valid power of condemnation may be conferred by statute upon corporations or companies engaged in this work, the exercise of this power, being a taking of private property, should be safeguarded, and adequate provision made for compensating the private owners whose lands are taken against their will, or upon which damages are inflicted in the prosecution of the work, and, unless this is done, the law must be declared invalid. Constitution, Art. I, sec. 1.

2. Same—Interpretation of Statutes.

Chapter 141, Laws of 1915, regulating drainage, provides, among other things, that a majority of landowners or persons owning three-fifths of the land in a given area of "defined swamp or lowland land" may contract with any person, firm or corporation to cut a canal and drain along a proposed route, "whether the owners of said land consented thereto or not," and the contractor shall have the necessary right of way for that purpose and for all things incident thereto through any lands or timber situated within said "swamp or lowland." A lien is given on the lands for the payment of assessments to cover the cost of drainage, etc., and the minority owners are required to pay their proportionate amount of the cost, to be assessed, etc., with no provision for damages beyond the value of the benefits they may receive from the work thus done, or any responsibility placed for the payment of such damages or funds with which to pay them, should they exist. In this respect the statute is unconstitutional and void, as a taking of private property without providing for just compensation to the private owner of the lands, whose consent has not been given.

APPEAL by plaintiff from *Bond, J.*, 4 September, 1915, at chambers in GREENVILLE.

Civil action heard on return to preliminary restraining order. The action was for the purpose of restraining defendant company from entering and trespassing upon plaintiff's lands without warrant of law, defendants claiming the right to do so under and by virtue of ch. 141, Laws 1915, entitled "An act to encourage the reclamation and improvement of swamp and lowlands."

On the hearing, it was made to appear that defendants were proceeding to cut a large canal through the lands of plaintiff, and there was evidence on part of plaintiff that he was a minority landowner lying along the route of the proposed canal; that he had not entered into any agreement or in any way joined in the undertaking, and that the cutting of the canal as proposed through the lands of plaintiff would cause him great damage. There was judgment dissolving the restraining order, and plaintiffs, having duly excepted, appealed.

Harding & Pierce for plaintiff.
Loftin, Dawson & Manning for defendant.

HOKE, J., after stating the case: With every disposition to uphold the drainage laws enacted by our Legislature, we are unable to reconcile this statute with the provisions of our Constitution, guaranteeing the rights of private property. Constitution, Article I, sec. 17; Connor and Cheshire's Annotations, p. 52 *et seq.* The act, Laws 1915, ch. 141, provides, among other things, that a majority of landowners or persons owning three-fifths of the land in a given area of "defined swamp or lowland" may contract in writing with any person, firm or corporation to cut a canal and drain along a proposed route, "whether the owners of said land have consented thereto or not," and the contractor shall then have the necessary right of way for that purpose and "for all things incident thereto through any lands or timbers situated within said swamp or lowland." The act then provides that, "on completion, the minority landowner may be held liable for his proper part of the cost, and, at the instance of the contractor, he may be cited before the court and have the same assessed against him, and the amount is declared to be a lien upon his property within the given area." There is no provision made for paying the minority or other landowner in case the proposed canal shall cause damage to his land over and above the benefits conferred, nor is there any responsible paymaster or fund designated or provided for the payment of such damage if it exist. On the contrary, a perusal of the statute will disclose that no such payment is contemplated or allowed by the law, the only hearing referred to being to ascertain and adjudge "what amount shall be paid by the various landowners who may have failed to arrange for and agree upon the compensation to be paid for the said drainage."

It will thus be seen that the majority in number or three-fifths in ownership "in any defined swamp or lowland," a very indefinite term for the justification of such unusual and extended powers, without notice to the minority landowners or any consultation with them, may contract and agree with any "person, firm or corporation," however inefficient or irresponsible, and such contractor is then authorized and empowered to enter on the lands of a private owner with any force he may consider desirable, cut a canal of any size or character that may be agreed upon between these third parties, and no provision whatever made for compensation to such owner for any damage that may be done to his property, the single limitation being that collections to be made from him shall not exceed the benefits derived by him.

It has long been recognized here that our lowlands, particularly in the eastern part of the State, are of such exteneded area and give such promise of productive fertility and their proper drainage affects the

public weal to such a degree that the power of eminent domain, when properly safeguarded, may well be conferred upon corporatiins or companies engaged in this work when, in a given case, it is of such extent that the exercise of the power is required for the efficient carrying out of the enterprise. *Newby v. Drainage District,* 163 N. C., 24; *In re Drainage District,* 162 N. C., p. 127; *White v. Lane,* 153 N. C., p. 14; *Sanderlin v. Luken,* 152 N. C., p. 739, citing *Norfleet v. Cromwell,* 70 N. C., p. 634, where the position and the principle on which it rests are very impressively stated by *Rodman, J.* And it is also fully established here and elsewhere that, where such power is conferred by statute and it becomes necessary to exercise it, either in the general law on the subject or in the statute itself, some adequate provision must be made for compensating the private owner whose lands are taken or upon which damages are inflicted in the prosecution of the work, and, unless this is done, the law must be declared invalid. *S. v. Haynie, ante,* 277; *Commissioners v. Bonner,* 153 N. C., pp. 66-71; *Brown v. Power Co.,* 140 N. C., p. 333; *S. v. Lyle,* 100 N. C., p. 497. True, we have held that it is not always required that this compensation must be made in advance. Not infrequently it is otherwise (*S. v. Jones,* 139 N. C., p. 613); but the entry on another's land pursuant to authority, professedly conferred by statute for the purpose of cutting and maintaining a canal or ditch, large or small, constitutes a taking within the meaning of the constitutional principle (*S. v. New,* 130 N. C., p. 731; 15 Cyc., p. 659), and, as the courts have said in some of the cases, whenever this is done in the exercise of the power of eminent domain, somewhere in the course of the proceedings, before the same has become a fixed charge or burden upon his property and before some authoritative and impartial tribunal, the owner is entitled to be heard and to be compensated for the injury done him. It is no answer to this position that, in the particular case before us, no harm is likely to occur or that the power is being exercised in a considerate or benevolent manner, for where a statute is being squared to requirement of constitutional provision, it is what the law authorizes and not what is being presently done under it that furnishes the proper test of its validity.

In his well prepared and thoughtful argument before us we were referred, by counsel for the appellee to the case, among others, of *Brown v. Keener,* 74 N. C., p. 714, as an authority in support of the constitutionality of the present act. An examination of that case will disclose that the Court was construing a law providing for the clearing out of Clark's Creek, in the counties of Lincoln and Catawba, for a distance of about eighteen miles; that it was a stream having a well defined channel, averaging from 2 to 5 feet in depth, and the same had become so clogged with logs and other obstructions that the lowlands thereon were rendered, for lack of proper drainage, unfit for cultivation and

much sickness was being caused by reason of the obstructed flow of the stream. In such case the act was passed dividing the distance specified into sections, appointing commissioners to supervise the work and assessing the landowners along the course of the stream for a small amount for the payment of clearing out and, where necessary, straightening the stream. There was no additional burden put on the property owners, and it presented, to our minds, a very different proposition from that contained in the present statute, where, as heretofore stated, by action *inter partes,* a majority of the landowners may contract with any person, firm or corporation to enter on the lands of a private owner without any notice to him or opportunity to be heard, open up and maintain an original canal through his land without any reference to the necessities or requirements of the land itself and without making any provision whatever for compensation in case the land is injured, and even stipulating by clear inference that no damage therefor may be allowed.

If the proposed scheme shall contain promise of benefit to the lands affected, it may be that some arrangement between all the parties interested can be made by which the work may proceed, but we are compelled to hold that no justification for this proceeding can be had from this statute which, in its present form and for reasons given, is not a valid law. On the record, there was error in dissolving the restraining order, and the judgment of the court below is

Reversed.

J. O. CARR AND J. D. WORTHINGTON, RECEIVERS, v. ALEXANDER & GARSED.

(Filed 20 October, 1915.)

1. Evidence—Vendor and Purchaser—Verified Account—Prima Facie Case.

An itemized account purporting to be for goods sold and delivered to the defendant introduced in evidence, in an action to recover the purchase price, and duly sworn to, is competent, and raises a *prima facie* case as to the amount thereby appearing to be due. Revisal, sec. 1625.

2. Vendor and Purchaser—Evidence—Prima Facie Case—Principal and Agent—Accounting—Burden of Proof.

Where a *prima facie* case has been made out by the plaintiff, in his action to recover the purchase price of goods sold and delivered to the defendant, and the latter contends that he, as the agent for the former, was to sell upon commission, and that he had accounted for such sales, except a small balance which he tendered, or offered to submit to judgment for that amount, the burden is upon the defendant to show the fact of agency, and of accounting thereon, which is for the determination of the jury upon the question of indebtedness.

3. Trials—Issues—Forms.

Where the issue submitted by the court clearly presents the issuable facts in an action, the form thereof is immaterial.

CARR *v.* ALEXANDER.

APPEAL by defendant from *Peebles, J.,* at the March Term, 1915, of SAMPSON.

Civil action tried upon the following issue:

1. What amount, if anything, are the defendants indebted to plaintiffs? Answer: "$2,534.76, with interest from 7 November, 1913, at six per cent."

From the judgment rendered, the defendant appealed.

Butler & Herring for the plaintiffs.
Thomas W. Alexander for the defendant.

BROWN, J. The plaintiffs offer in evidence a duly verified statement of account for certain merchandise alleged to have been sold by the plaintiffs as receivers of the Coharie Lumber Company to the defendant, consisting of thirteen items, including boilers, belts, dry-kiln trucks, planer, knife-grinder, engine, drill, forge, etc., etc., and rested their case.

This account is duly sworn to and itemized and purports to be an account for goods sold and delivered by the plaintiffs as receivers to the defendants. The account was offered in evidence under section 1625 of the Revisal. It was not objected to by the defendants, but its probative force is challenged by prayer for instruction. We are of opinion that the account under the statute was *prima facie* evidence of the correctness of the plaintiff's claim, and that it is made out in accordance with the requirements of Revisal, section 1625. *Knight v. Taylor,* 131 N. C., 84; *Claus v. Lee,* 140 N. C., 552.

We think, therefore, that his Honor very properly admitted it as *prima facie* evidence of the truth of the allegations of the complaint. The defendants in their answer denied that they purchased the machinery, claiming that during the period mentioned in the complaint they acted as the agents of the plaintiffs for the sale of the machinery upon a commission of ten per cent, and that they have fully accounted for and paid over to the plaintiffs the entire proceeds thereof with the exception of a certain note and an open account.

It is manifest that the burden was upon the defendants to prove their plea of agency and that they had accounted to the plaintiffs in due course. According to the record, the only evidence offered by the defendant is a check for $306.16, drawn by the defendants in favor of John D. Worthington, receiver, and also a portion of a letter signed by the plaintiffs, tending to prove that the defendants were acting as their agents in the sale of this machinery. But the defendants offer no evidence as to what machinery had been sold by them, how much they had received for it, how much remained on hand, and how much they had paid over to the plaintiffs. In this condition of the evidence, there was nothing to show that the defendants had fully accounted, as the agents

of the plaintiffs, or had paid over the proceeds of the sale of the machinery. The defendants tendered into court $137.69 and offered to allow judgment against them for this amount. His Honor very properly submitted the case to the jury upon the issue of indebtedness.

The defendants tendered certain issues as to whether the defendants were the agents of the plaintiffs in the sale of the machinery which his Honor declined to submit. This controversy could very well have been considered by the jury under the issue as submitted by the court. The form of issues is of little consequence, if the material facts at issue are clearly presented by them. *Paper Co. v. Chronicle,* 115 N. C., 147; *Fleming v. R. R.,* 115 N. C., 676.

The defendants assign error because his Honor, in his charge, conveyed an expression of opinion "highly adverse and detrimental to the defendants."

We have examined the charge of his Honor with care, and we do not think it is justly subject to such criticism. The case was one almost entirely of fact, and the only evidence offered was a verified account with the plaintiffs and the check and a part of a letter heretofore mentioned by the defendants.

We think his Honor properly presented the matter to the jury.

Affirmed.

JAMES F. AND W. E. PARROTT v. FANNIE HARDESTY ET AL.

(Filed 20 October, 1915.)

1. Judicial Sales—Mortgages—Equity of Redemption—Purchaser—Rights to Possession.

The equity of redemption of a mortgagor of lands is subject to sale under execution under a judgment obtained against him, and the sheriff's deed made in pursuance thereof passes his interest to the purchaser and enables the latter to maintain his action to recover the lands from the mortgagor or his assignee.

2. Same—Limitation of Actions—Adverse Possession—Evidence.

Where the purchaser of land sold under execution acquires the sheriff's conveyance of the equity of redemption, and the right to recover possession unless the same is barred by the adverse possession of one holding under a deed from the mortgagor and the note and mortgage assigned to him by the mortgagee, and it appears that the deed was executed within five years from the commencement of the action and that the assignment of the note and mortgage did not purport to operate upon the land, evidence of such adverse possession is held insufficient when the claimant, though testifying that he had lived on the land for about eight years, and farmed it five years before he came into possession of it, does not state the character of the possession he had held, and the time elapsing between the execution of his deed and the time the action commenced, being insufficient.

3. Appeal and Error — Assignment of Error — Rules of Court — Counsel — Waiver.

The rule requiring the assignment of errors in the record on appeal is for the benefit of the Court, and counsel cannot waive it.

APPEAL by defendant from *Connor, J.*, at the May Term, 1915, of CRAVEN.

Action to recover land. Prior to 27 August, 1892, B. B. Mallison was the owner of the land in controversy, and on that day he conveyed the same to The Meadows Company by mortgage deed, to secure a debt therein set forth. On 1 January, 1906, the plaintiff and his brother obtained a judgment against said Mallison which was duly docketed in the county where the land is situate. On 10 February, 1908, the said Mallison executed a deed to the defendant Mary F. Hardesty, purporting to convey said land, and on 10 February, 1908, The Meadows Company assigned the debt and mortgage held by it to said Mary F. Hardesty, but this assignment did not profess to act upon the land described in the mortgage. Execution was issued upon the judgment obtained by the plaintiff and his brother, the land was sold thereunder and the plaintiff became the purchaser, and a deed was executed to him in September, 1911.

This action was commenced 15 December, 1913.

The only evidence as to who has been in possession of the land is that of E. H. Meadows, who testified: "My recollection is that the rent came to us through Mallison up to the time this woman bought the mortgage. She may have paid it for Mallison," and the evidence of L. H. Hardesty, who testified: "I know the land described in the complaint; my wife and I live on it; we have been living there about eight years; I farmed it five years before I came into possession of it. We did not pay Mallison anything for the deed made for the land."

There was a verdict and judgment for the plaintiff, and the defendant appealed, presenting only one contention in his brief, and that is that the possession by the defendants bars the plaintiff's right of recovery, and if not, that the defendant as the purchaser of the note and mortgage of Meadows Company is in the rightful possession of the land and cannot be dispossessed by the plaintiff.

Guion & Guion for plaintiff.
W. D. McIver for defendants.

ALLEN, J. When the plaintiff procured his judgment the defendant therein was the owner of the equity of redemption in the land, and this was the subject of sale under execution. *S. v. Pool*, 27 N. C., 105; *Mayo v. Slaton*, 137 N. C., 670. The deed of the sheriff made pursuant to the sale passed this equity of redemption to the plaintiff, and was sufficient

to enable the plaintiff to maintain his action to recover possession of the land against the mortgagor, and the position of the defendant, who is the assignee of the mortgagor, is no better than his. *Davis v. Evans,* 27 N. C., 532; *Black v. Justice,* 86 N. C., 512.

In the last case, after citing the case of *Davis v. Evans,* the Court says: "*Chief Justice Ruffin,* speaking for the Court in that case, says: 'We consider the equity of redemption when sold under execution, a legal interest to the extent, at least, of enforcing it by the recovery of possession from the mortgagor himself.'" It follows, therefore, that the plaintiff has shown title to the land in controversy, and was entitled to recover possession unless there is evidence of a possession in the defendants that would bar the plaintiff's right of action, and in our opinion it is insufficient to do so.

The character of the possession of the husband of the *feme* defendant prior to the execution of the deed to her is not shown, and so far as the record discloses he was not holding adversely to any claim, and he may have been in possession by permission or as tenant, and the possession by the defendants since the execution of the deed cannot be more than five years, as the deed was executed in 1908 and the action was commenced in 1913.

Nor can the claim of the defendant that she is rightfully in possession as mortgagee be sustained, because it is expressly stated that the assignment of the note and mortgage to her did not purport to operate upon the land. *Williams v. Teachey,* 85 N. C., 402; *Dameron v. Eskridge,* 104 N. C., 621; *Morton v. Lumber Co.,* 144 N. C., 31; *Weil v. Davis,* 168 N. C., 302. This is the only question presented in the brief, and it does not appear that the defendant asserted any claim as assignees of the note and mortgage of Meadows Company, except that it entitled her to retain possession against the plaintiff.

We call attention to the fact that there is no assignment of error in the record, and that the rule requiring assignments to be made is for the benefit of the Court and to enable it to properly examine cases upon appeal, and that counsel cannot waive the requirement of the rule.

No error.

A. B. WILLIS ET AL. V. B. J. COLEBURN AND J. A. ROYALL.

(Filed 20 October, 1915.)

Costs—Successive Defendants—Sale of Interest—Subsequent Party.

Where it appears, in an action involving the title to lands, that the defendant has since then sold his interest therein to another, and the latter, at his request, has been made a party defendant, and the plaintiff has succeeded in the suit, it is proper, in taxing the cost, to tax the one later made defendant with the cost incurred subsequent to his becoming a party, as between the defendants; and to tax both parties jointly and severally with the costs, as it affects the plaintiff.

APPEAL by defendants from *Connor, J.*, at the June Term, 1915, of CARTERET.

Motion to retax a bill of cost.

Moore & Dunn for the plaintiffs.
Julius F. Duncan for the defendants.

BROWN, J. This is an action in the nature of trespass, in which the title to land is put in issue by the pleadings. The jury found that the plaintiff is the owner of the land; that the defendant Coleburn committed trespass thereon to the extent of $1. On a motion to retax the bill of cost, the defendant appealed from the ruling of the clerk to the judge.

It appears that the plaintiff Willis conveyed his interest in the land, pending the suit, to one Gorham, and that the defendant Coleburn conveyed his interest in the land to one J. A. Royall. Both Gorham and Royall, upon their own applications, were made respectively, parties plaintiff and defendant, at March Term, 1913. The case was tried at June Term, 1914, with the result aforesaid.

The trial judge, *Daniels*, adjudged that the cost of the action "be taxed against the defendants Royall and Coleburn, as the same appears to be due by each respectively." The appeal from the clerk was heard by *Judge Connor*, who adjudged that, as between the defendants Coleburn and Royall, that Royall is liable for the costs of the action subsequent to his joinder in this suit, but that both defendants are jointly and severally liable to the plaintiffs for all the costs of the action.

We think this ruling correct. The record shows that the defendant Royall came in practically as a substitute for Coleburn, and of his own accord, and that he adopted the answer of his codefendant and made the cause his own. He is, therefore, liable for all the costs of the action, as the title to the land was adjudged against him.

Affirmed.

GEORGE A. LUPTON v. THE SOUTHERN EXPRESS COMPANY.

(Filed 20 October, 1915.)

1. Evidence—X-Ray Photographs—Accuracy.

X-Ray photographs taken of a personal injury alleged to have been negligently inflicted by the defendant, in an action to recover damages therefor, may, with proper safeguards as to their accuracy, be used by the witness who has made them in explaining his evidence and be shown by him to the jury for their consideration and enlightenment.

2. Same—Expert Testimony—Exhibits to Jury.

Where an X-Ray picture of a personal injury, pertinent to the inquiry in an action to recover damages, has been made by a medical expert, who testifies to some experience in making such pictures, and it is a reasonable inference from his evidence that it was an accurate and true representation, and his whole evidence shows that he believes it to be so, it is sufficient evidence of the accuracy of the photograph for the expert to explain his testimony therewith and exhibit them to the jury.

3. Appeal and Error—Evidence—Statement of Contentions—Admissions.

Where the evidence of both parties are in harmony with the establishment of a certain fact, and the trial judge has erroneously stated it as an admission, the objecting party should have caused the correction to have been made at the time, and in this case no reversible error is found, the judge having clearly stated the contentions of the parties and applied the law applicable to the evidence.

4. Instructions—Trials—Charge as a Whole—Harmless Error.

The error complained of in the charge in this case is untenable, being taken to statements by the court of the contention of the parties, which arose from the evidence, and to single expressions taken from a paragraph, the charge, construed as a whole, being correct; and this applies to a statement of the court, relating to the contention of the parties, that compensation cannot be awarded for physical pain and mental suffering, which taken alone would be error.

APPEAL by defendant from *Connor, J.*, at the June Term, 1915, of CARTERET.

Action to recover damages for personal injury. The plaintiff introduced evidence tending to prove that while on the platform of the railroad company at New Bern, for the purpose of taking passage on the train, an agent and employee of the defendant negligently ran a heavy truck against him, striking him violently in the back, causing him to fall, and the truck passed over one of his feet, to his serious injury.

The defendant introduced evidence tending to prove that there was no negligence; that the plaintiff was standing on the platform holding to a post, and, as the truck passed him that his foot slipped and went under the truck.

Dr. Pollock, a witness for plaintiff, testified:

I am a doctor of medicine. (Admitted to be an expert.) Have had some experience in X-Ray work. Took X-Ray photograph of Lupton's

foot, as shown by plates in my hand. Took photographs of his right foot. No injury there. Also of left foot. (Shows plates to the jury. Defendant objects; overruled; defendant excepts.) Photograph of left foot shows that bone of fourth toe of foot has been broken. Plate shows callous formed at broken place. This callous would cause pain and is permanent. Pain caused by callous on bone of fourth toe rubbing against bone of third toe. Friction sets up inflammation and causes pain.

Cross-examination: Plate does not show injury to big toe, nor whether injury to fourth toe was done in childhood or not. I did not examine or photograph Lupton's back. Know Dr. Primrose. He would possibly know, after examination, whether bones were broken or not. Callous does not necessarily form on both sides of broken bone. X-Ray is only sure way, except by operation, to ascertain whether bones are broken or not.

At the conclusion of the evidence there was a motion for judgment of nonsuit, which was overruled, and the defendant excepted.

The court charged the jury, among other things, as follows:

In this case, counsel for plaintiff and defendant, during their argument to you, have admitted that George A. Lupton, the plaintiff, while standing at or near the shed of the Norfolk Southern Railroad Company, at New Bern, was struck by a truck being moved by employees of the defendant, the Southern Express Company; that while engaged in conversation with Mr. Bell, to whom he had just paid a bill, and while putting his pocketbook into his pocket, the truck struck him. Defendant excepted. There was a verdict and judgment for the plaintiff, and the defendant excepted and appealed.

C. R. Wheatly and Abernathy & Davis for plaintiff.
Julius F. Duncan for defendant.

ALLEN, J. There is no objection to the description of the injury as disclosed by the X-Ray plates. The exception is only to the exhibition of the plates to the jury, and as there is nothing to show any variance between the plates and the description given by the witness, we might dispose of the exception upon the ground that the ruling permitting the jury to see the plates, if erroneous, is harmless. We are, however, of opinion that it was competent to introduce the plates and to permit the jury to see them.

What was said in *Frank v. Bank*, 37 N. Y. Sup. Ct., 34, which is approved in *Bank v. McArthur*, 165 N. C., 374, in reference to the microscope, is equally pertinent as applied to the X-Ray: "The administration of justice profits by the progress of science, and its history shows it to have been almost the earliest in antagonism to popular

delusions and superstitions. The revelations of the microscope are constantly resorted to in protection of individual and public interests. It is difficult to conceive of any reason why, in a court of justice, a different rule of evidence should exist in respect to the magnified image presented in the lens of the photographer's camera and permanently delineated upon the sensitive paper. Either may be distorted or erroneous through imperfect instruments or manipulation, but that would be apparent or easily proved. If they are relied upon as agencies for accurate mathematical results in mensuration and astronomy, there is no reason why they should be deemed unreliable in matters of evidence. Whenever what they disclose can aid or elucidate the just determination of legal controversies, there can be no well-founded objection to resorting to them."

It has been held in several cases in our reports that the ordinary photograph when shown to be a true representation and taken under proper safeguards is admissible in evidence (*Davis v. R. R. Co.*, 136 N. C., 115; *Pickett v. R. R.*, 153 N. C., 148), and the same rule prevails as to photographs taken by the X-Ray process.

"While a picture produced by an X-Ray cannot be verified as a true representation of the subject in the same way that a picture made by a camera can be, the rule in regard to the use of ordinary photographs on the trial of a cause applies to photographs of the internal structure and conditions of the human body taken by the aid of X-Ray, when verified by proof that they are a true representation. It has been held that, to constitute a foundation for the introduction of an X-Ray photograph in evidence, it is not essential that it appear that it was taken by a competent person, nor that the condition of the apparatus with which it was taken and the circumstances under which it was taken were such as to insure an accurate picture; but where it has been shown by the evidence of competent witnesses that it truly represents the object it is claimed to represent, there is sufficient foundation for its admission." 17 Cyc., 420.

"Photographs taken by X-Ray process are admissible upon the same principles under similar circumstances with like effect as ordinary photographs." Enc. Ev., vol. 9, 775.

"The accuracy of a properly taken X-Ray photograph of the bones of a living body will be judicially known." 1 Chamb. Mod. Ev., vol. 1, sec. 729.

"The process of X-Ray photography is now as well established as a recognized method of securing a reliable representation of the bones of the human body, although they are hidden from direct view by the surrounding flesh, and of metallic or other solid substances which may be imbedded in the flesh, as was photography as a means of securing a

representation of things which might be directly observed by the unaided eye at the time when photography was first given judicial sanction as a means of disclosing facts of observation, and for that purpose X-Ray photographs, or sciagraphs, or radiographs, as they are variously called, have been held admissible on the same basis as photographs. *Bruce v. Beall*, 99 Tenn., 303, 41 S. W. Rep., 445; *Miller v. Dumon*, 24 Wash., 648, 64 Pac. Rep., 804; *Chicago, etc., Electric Co. v. Spence*, 213 Ill., 220, 72 N. E. Rep., 796; *Carlson v. Benton*, 66 Neb., 486, 1 Am. Cas., 159, 92 N. W. Rep., 600; *Geneva v. Burnett*, 65 Neb., 464, 91 N. W. Rep., 275; 1 Wigmore Evidence, paragraphs 795-797. As is said in *Mauch v. Hartford*, 112 Wis., 40, 87 N. W. Rep., 816: 'It is the duty of courts to use every means for discovering the truth reasonably calculated to aid in that regard. In the performance of that duty every new discovery, when it shall have passed beyond the experimental stage, must necessarily be treated as a new aid in the administration of justice in the field covered by it. In that view, courts have shown no hesitation, in proper cases, in availing themselves of the art of photography by the X-Ray process.'" *S. v. Matheson*, 130 Iowa, 440.

This case is also reported in 8 A. and E. Ann. Cases, and the editor states his conclusion, in the note on page 435, to be: "There seems to be no doubt of the admissibility of X-Ray photographs in evidence upon a proper occasion. It is now a recognized fact that by the aid of proper apparatus a picture of the framework of the human body may be obtained that will more or less sharply define the skeleton and any foreign substance that may be lodged in the body. Therefore X-Ray photographs are admissible in evidence when proper proof of their accuracy and correctness is produced. *Miller v. Mintum*, 73 Ark., 183, 83 S. W. Rep., 918; *Chicago, etc., Electric R. Co. v. Spence*, 213 Ill., 220, 72 N. E. Rep., 796; *Jameson v. Weld*, 93 Me., 345, 45 Alt. Rep., 299; *De Forge v. New York, etc., R. Co.*, 178 Mass., 59, 59 N. E. Rep., 669; *Carlson v. Benton*, 66 Neb., 486, 1 Ann. Cas., 159, 92 N. W. Rep., 600; *Bruce v. Beall*, 99 Tenn., 303, 41 S. W. Rep., 445. See, also, *Frazer v. California St. Cable R. Co.*, 146 Cal., 714, 81 Pac. Rep., 29; *Sias v. Consolidated Lighting Co.*, 73 Vt., 35, 50 Alt. Rep." *Carlson v. Benton*, 66 Neb., 486; *Bruce v. Beall*, 99 Tenn., 303, and other cases cited in the note to the quotation from Cyclopedia of Law, support the text.

There was also no error in permitting the jury to see the plates. The rule, based on want of confidence in the intelligence of jurors, formerly prevailed that jurors might hear but could not see, but it has been expressly repudiated in this State. *Martin v. Knight*, 147 N. C., 578; *Nicholson v. Lumber Co.*, 156 N. C., 59.

In the first of these cases *Justice Connor*, discussing the propriety of permitting a jury to see a paper whose genuineness was in contro-

versy, says: "The purpose of the evidence is to aid the jury. Why convey information through the sense of hearing and exclude the sense of seeing? Can it be doubted for a moment that they would receive a clearer, more intelligent view of the matter in controversy if permitted to have the explanation made with the aid of their sight? We know from experience that arguments in this Court are illuminated and our apprehension of the matter in controversy made clearer by maps in cases involving the management of machinery or the situation of parties. It was supposed in the past that the average juror was not sufficiently intelligent—educated—to comprehend the fine shades of difference in handwriting. Whatever may be thought of the soundness of the reason in the past, it is manifest that it has but little force at this time. As education and intelligence have increased and the methods of illustration improved, the capacity of the 'average man' to write and pass upon the handwriting of others has advanced."

It is true that the witness who made the X-Ray photographs does not say, in so many words, that the photograph is an accurate and true representation of the condition of the foot, but this is a reasonable inference from his evidence. He had sworn that he would tell the truth; he was an expert and experienced in the manipulation of the X-Ray, and his whole evidence shows that he believed the photographs to be a true representation of the condition of the foot.

His Honor did not, at any time, tell the jury, as contended by the defendant, that the defendant admitted negligence, and if he erroneously stated that counsel for the defendant admitted in the argument that the plaintiff was struck by the truck, it was the duty of counsel to correct his error. *LaRoque v. Kennedy,* 156 N. C., 372.

All the evidence for plaintiff and defendant showed that the plaintiff was injured by the truck, and the question in controversy was how the injury occurred, and this was submitted to the jury under proper instructions, which stated fully the contentions of the defendant.

There are other exceptions to the charge which need not be considered separately. They consist principally of objections to statements of contentions of the parties, which arose upon the evidence, and to single expressions taken from a paragraph, which are free from criticism when considered in connection with the context. We would not approve the expression that adequate compensation cannot be awarded for physical pain and mental suffering, standing alone, but the whole charge shows that his Honor was indicating the difficulty of fixing a money value for physical pain and mental suffering, which all admit, and that he instructed the jury that no damages could be awarded as punishment, and only a just compensation based on the evidence.

Several exceptions are to charges favorable to the defendant.

The motion for judgment of nonsuit is not discussed in the brief and need not be considered, except to say that the evidence in the record was sufficient, if believed, to establish the negligence of the defendant and damage to the plaintiff as the proximate result thereof.

We find no error upon the trial.

No error.

CLARK, C. J., concurs, especially in the proposition illustrated by the citation from *S. v. Matheson,* 130 Iowa, 440: "It is the duty of the courts to use every means for discovering the truth, reasonably calculated to aid in that regard. In the performance of that duty, every new discovery, when it shall have passed beyond the experimental stage, must necessarily be treated as a new aid to the administration of justice in the field covered by it. In that view, courts have shown no hesitation, in proper cases, in availing themselves of the art of photography by the X-Ray process." This case is reported in 8 A. and E. Ann. Cases, 435, with annotations.

When the question of the admissibility of photographs was first presented to this Court, in *Hampton v. R. R.,* 120 N. C., 534, it was held by a divided Court that they were inadmissible, because the Court had never known of their being used; but the dissenting opinion in favor of their admissibility has ever since been held to be the law. In *Lowman v. Ballard,* 168 N. C., 16, the Court disallowed the validity of service of process over the telephone by a divided Court, but this has since been allowed, except as to summons (as to which the statute is silent) by chapter 48, Laws 1915.

The admissibility of the X-Ray photography as evidence is now well accepted in jurisprudence.

FRANK HOLDEN ET AL. v. JOHN A. ROYALL.

(Filed 20 October, 1915.)

1. Limitations of Actions—Contract Price — Payment — Reasonable Time — Questions for Jury.

In an action to recover the balance of the purchase price of lands, with allegation and evidence that the defendant purchased the interest therein of the several plaintiffs at a certain price upon agreement that they should receive the same as the other owners of the land, who had subsequently been paid a greater price, the defendant pleaded the statute of limitations, three years and a day or two having elapsed since the transaction with an owner receiving a larger sum. There was evidence *per contra. Held,* the character of the transaction, if established, implied that the defendant should be given a reasonable time in which to pay the plaintiffs this difference in price, and this question of reasonable time was one to be determined by the jury, together with the question of whether the alleged agreement had been made.

2. Contracts—Purchase Price—Definite Sum—Pleadings—Issues.

Where the plaintiff in his action seeks to recover a certain sum in addition to that he has received from the defendant for his land, and the defendant denies that he owes more than he has paid, with conflicting evidence as to the extent of the plaintiff's interest in the lands, but the defendant does not seek to set aside the sale and there is no averment of imposition or fraud: *Held*, no issue is raised in diminution or rebuttal of the plaintiff's demand, the question being whether or not the defendant had definitely agreed to pay this further sum of money.

APPEAL by defendant from *Daniels, J.*, at the October Term, 1914, of SAMPSON.

Civil action. Action was instituted 29 January, 1914, and plaintiffs, three of the sisters of defendant, alleged and offered evidence tending to show that, in 1909, defendant bought of plaintiffs their interest in the land of their father, deceased, each for the sum of $75, and agreed that, if he had to pay any greater sum for procuring any of the other interests, he would come back and pay plaintiffs the amount of the difference, making each and all of them equal; that subsequently, towit, on 28 January, 1911, defendant bought the interest of another sister, paying therefor the sum of $200. The action is to recover for each of plaintiffs $125=$375, the amount due as per terms of the alleged agreement.

Defendant denied the agreement as alleged, offering evidence in support of his denial, and pleaded the statute of limitations in bar of the demand. There was evidence tending to show that one plaintiff lived two and a half miles from defendant, another about three miles, and another about thirteen miles, and Mrs. Bradshaw twenty miles.

There was verdict for plaintiff on the issue establishing the claim and on the statute of limitations. Judgment on the verdict, and defendant excepted and appealed.

J. C. Write, H. E. Faison for plaintiff.
John D. Kerr for defendant.

HOKE, J. The issue as to defendant's liability was properly submitted to the jury, as a question of fact, and was resolved by them in favor of plaintiffs.

On the statute of limitations, it will be noted that defendant bought certain lands and paid the $200 to Mrs. Bradshaw for her part on 28 January, 1911, and the action was commenced on 29 January, 1914, so that, if plaintiffs' cause of action accrued instanter on the payment of the money, the claim is barred. The court below, however, held that, under the terms of the agreement, if established, as claimed by plaintiffs, the defendant had a reasonable time, after buying Mrs. Bradshaw's land, in which to pay the additional amount; that plaintiffs' cause of action

did not accrue till such time had elapsed, and referred it to the jury to determine "whether one or two days, say two days," was a reasonable time or otherwise, etc.

It is very generally recognized that when the time for the obligations of a contract to become effective is left indeterminate, a "reasonable" time is to be allowed (*Winders v. Hill,* 141 N. C., pp. 694 and 705; *Michael v. Foil,* 100 N. C., p. 178; *Houghwont v. Boisanbin,* 18 N. J. Eq., p. 315; Clark on Contracts, p. 433), and, in application of the principle, "When a contract is made to do an act which it is evident was not intended by the parties should or would be done until certain other things are done, the statute of limitations does not begin to run until a reasonable time after such things are done." 1 Wood on Limitations (2 Ed.), p. 323. And, in this State, authority is to the effect that, where this question of reasonable time is a debatable one, it must be referred to the jury for decision. *Claus v. Lee,* 140 N. C., p. 552; *Blalock v. Clark,* 137 N. C., p. 140.

This being the doctrine, as it obtains with us, we concur in his Honor's view, that the present case comes within the principle.

Under the facts and attendant circumstances, as they have been accepted by the jury, it would have been a hard measure of justice to have subjected defendant to an action in the courts by each and all of these plaintiffs, situate in different localities, and the very instant he was required to pay more for an interest than he had paid them, and, the time being left indeterminate by the agreement, he was properly allowed a reasonable time to "go back and pay them," and plaintiffs' cause of action, therefore, did not accrue till there was default in this obligation.

We are not inadvertent to a line of decisions in this State which very insistently hold that, where a cause of action exists, mere ignorance of the facts constituting the same will in no wise prevent or interrupt the running of the statute. See *Blount v. Parker,* 78 N. C., p. 128, and several other decisions to like effect; but, in these cases, it will be noted that the cause of action had accrued, whereas the present case has been decided on the ground that until a reasonble time had elapsed after the payment to Mrs. Bradshaw, no right of action had accrued to plaintiffs, and the statute, therefore, did not commence to run before that time.

There are additional allegations in the answer, with evidence tending to show that the title to a good portion of the lands purchased was already in defendant, and there is also evidence on the part of plaintiffs tending to show that plaintiffs owned all that they purported to sell. But defendant does not seek to set aside the sale, nor is there any averment of imposition or fraud on the part of plaintiffs. The answer here amounts to no more than this: that, accepting defendant's claim

in this respect to have been established, the vendors did not have as great an interest in the property as both sides supposed, at the time of the purchase, and we concur also in the ruling of his Honor to the effect that these averments of defendant's answer raise no issue in rebuttal or diminution of plaintiffs' demand. We are of opinion that the case has been tried in accordance with our decisions, and the judgment in plaintiffs' favor is affirmed.

No error.

MOREHEAD SEA FOOD COMPANY, INC. v. B. C. WAY, TRADING AS B. C. WAY & CO.

(Filed 20 October, 1915.)

1. Contracts—Restraint of Trade—Interpretation of Statutes—Common Law.

An incorporation of fish dealers in a seaport town, with provision in the bill of sale of each business to the corporation, that the seller will not engage or become in any way interested in the same business in that and an adjoining county, and within a hundred miles from the town, for a period of ten years; and it appearing that the business engaged in by the corporation was at least coextensive with the territory prohibited, and that the transaction did not have the effect of lessening competition, is not prohibited by our statute, chapter 41, section 5, subsecs., Laws of 1913, which excepts from its inhibition persons, firms or corporations selling his or its business and good will to a competitor, and agreeing in writing not to enter the business in competition with the purchaser in a limited territory, as now allowed by the common law.

2. Contracts—Restraint of Trade—Partial Restraint—Reasonable Restrictions.

Under modern conveniences and changed business methods and conditions the common-law doctrine relating to transactions in restraint of trade has been modified and its meaning enlarged, the courts having soon recognized the distinction between contracts in general restraint and those in partial restraint of trade, sustaining the latter if they are not unreasonable.

3. Same—Territory—Competition—Public Policy.

A valid contract in partial restraint of trade, while primarily for the advantage of the purchaser of a business, inures to the benefit of the seller by enhancing the value of the good-will and enabling him to obtain a better price for the sale of his business, the test as to territory being whether the restraint agreed upon is such as to afford a fair protection to the interest of the party in whose favor it is given, and not so large as to interfere with the interest of the public; and such will not be held to be unreasonable when they do not affect the public and go no further than to remove the danger to the purchaser of competition with the seller.

CLARK, C. J., dissenting.

APPEAL by defendant from *Bond, J.*, at the June Term, 1915, of CARTERET.

Action to restrain the defendant from engaging in the business of a fish dealer in Morehead city in violation of an agreement whereby the

defendant agreed with the plaintiff, upon the plaintiff's purchasing his business, good will and certain personal property, not to carry on, be concerned in or interested in said business of a fish dealer for a period of ten years, within one hundred miles of Morehead City.

The plaintiff was duly organized on 14 March, 1914, and the defendant, one of the incorporators, was elected a director, vice president and general manager of the plaintiff, and he has continued in these positions up to the commencement of this action.

Prior to 14 March, 1914, the fish business of Morehead City was conducted by seven different firms, composed of eleven individuals. These fish dealers operated boats about the waters of North Carolina, and did a large fish business in North Carolina, South Carolina, Georgia, and in the northern and eastern markets. They were the only fish dealers at Morehead City, except two; but there are now, since the organization of the plaintiff, as many fish dealers at Morehead City as there were at the time of the organization of the plaintiff.

On 12 March, 1914, all of said eleven fish dealers formed the plaintiff corporation, known as Morehead Sea Food Company, and upon the organization of the company each entered into a contract of sale with the plaintiff, by which he sold his business and good-will as a fish dealer to the plaintiff, and the personal property used in connection with his business, and in each bill of sale there was the following covenant:

"The vendor hereby covenants with the purchaser that they will not directly, indirectly, solely or jointly, as principal, agent, manager or otherwise, be concerned or interested in the same business heretofore carried on as aforesaid by them within the counties of Carteret and Craven, in the State of North Carolina, and within one hundred miles from the town of Morehead City, aforesaid, for ten years from the date hereof, nor permit their names to be used in connection with such business."

Upon the hearing of the motion to dissolve the restraining order theretofore issued, his Honor continued the order to the hearing, and the defendant excepted and appealed.

Julius F. Duncan and Guion & Guion for plaintiff.
Moore & Dunn for defendant.

ALLEN, J. Two questions are presented by the appeal:

1. Is the agreement entered into between the plaintiff and the defendant a violation of the statute of this State enacted to prevent illegal trusts and combinations in restraint of trade?

2. If not, is the agreement unlawful under the common law?

The first question is answered by the statute (chapter 41, section 5, subsection F, Public Laws of 1913), wherein it is provided, "That nothing herein shall be construed to prevent a person, firm or corporation from selling his or its business and good will to a competitor, and agreeing in writing not to enter the business in competition with the purchaser in a limited territory, as is now allowed under the common law."

The contract under consideration comes within the class described in the statute, and is authorized by it, unless condemned by the common law. We must then examine the principles of the common law applicable to contracts of this character.

In the early cases contracts in restraint of trade were very generally held to be void, as against public policy, upon the ground that they tended to lessen the opportunities of the party restrained to earn a livelihood and to deprive the community of the benefit of competition. 6 Ruling Case Law, 785. The distinction was, however, soon recognized between contracts in general restraint of trade, which were held invalid, and those in partial restraint of trade, which were sustained, if not unreasonable.

The changes that have taken place in the methods of doing business, and the increased opportunities for communication, and the enlarged facilities for transportation have also materially modified the views of the courts as to what is an unreasonable restraint upon trade. Many new industries, unknown to the ancient common law, have been developed, which makes it easier for one engaged in business to seek other employment when he has contracted to give up his old business, and this has reduced the hardship of such a contract upon the individual, and the danger to the community has been greatly reduced because of the increased opportunities to deal with distant communities.

The good-will of a business was soon regarded as an important and valuable interest, which the law would recognize and protect (20 Cyc., 1276), and while there is authority for the position that the sale of the good will of a business by implication will prevent the seller from prosecuting the same business in competition with the purchaser, the weight of authority seems to be that the purchaser can only protect himself fully by a written agreement upon the part of the seller to refrain from entering into the same business.

"Good faith requires of a party, who has sold the good will of a business, that he shall do nothing which tends to deprive the purchaser of its benefits and advantages. Upon a sale of the good-will of a business, without more, the vendor is not precluded from setting up a precisely similar business in the vicinity. Upon the authorities it is settled that, if the purchaser wishes to prevent this step from being taken, he

must see to it that provisions to that effect are inserted in the written contract." 20 Cyc., 1279.

This stipulation while primarily for the benefit of the purchaser, inures to the advantage of the seller by enhancing the value of the good-will, and while "public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labor, skill, or talent by any contract that he enters into, on the other hand, public policy requires that when a man has, by skill, or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and, in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do this does not restrain him from alienating that which he wants to alienate, and, therefore, enables him to enter into any stipulation which, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract." 6 Ruling Case Law, 793.

There was also a tendency in the early cases to establish as the standard for determining the reasonableness of the contract, the duration of the contract as to time and the extent of the territory in which it was to operate; but under changed conditions, and in the effort to make the good-will a valuable asset, these tests have been abandoned, and the true test now generally applied is whether the restraint is such as to afford a fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interests of the public. 16 A. and E. Anno. Cases, 254.

As said in *Southworth v. Davison,* 106 Minn., 110, "The rule, broadly stated, seems to be that no contract of this kind is void as being in restraint of trade when it operates simply to prevent a party from engaging or competing in the same business. *Leslie v. Lorillard,* 110 N. Y., 519." In other words, the good-will of a business being recognized as intangible property, which the owner may sell, and it being for the benefit of the seller that it should be sold for its full value, and it being necessary for the protection of the purchaser that the seller should not, after the sale, enter into competition with him, contracts restraining the seller from engaging in the same business are upheld, and they are not unreasonable if they go no further than to remove the danger to the purchaser of competition with the seller.

The opinion in *Anchor Electric Co. v. Hawkes,* 171 Mass., 101, contains a learned and instructive discussion of the question. In that case the business managers of three corporations agreed to form a new corporation, of which they were to be the officers and directors. Each

corporation was to sell its assets and good-will to the new corporation, and as a part of the contract of sale each corporation represented by the managers agreed that it would not in any way interfere with or compete with the business of the new corporation for a period of five years.

The contract was sustained, and, among other things, the Court said: "Whenever one sells a business, with its good-will, it is for his benefit, as well as for the benefit of the purchaser, that he should be able to increase the value of that which he sells by a contract not to set up a new business in competition with the old. The right to make reasonable contracts of this kind in connection with the sale of the good-will of a business is well established. But the particular provisions which are reasonably necessary for the protection of the good-will of many kinds of business are very different now from those required in the days of Queen Elizabeth. Then the courts had occasion to inquire whether a limitation upon the right to engage in the same business as that sold was unreasonable because it included a town instead of a single parish, or extended a distance of ten miles instead of five. Now the House of Lords in England has held, by a unanimous decision in a recent case, that such a limitation which covered the whole world was not unreasonable. Because in early times it seemed inconceivable that an agreement to refrain from establishing a business of the same kind anywhere in the kingdom should be necessary to the protection of the good-will of any existing business, it was laid down as an arbitrary rule that agreements so comprehensive in their terms were void. Thus the distinction between a general restraint of trade and a partial restraint of trade grew up. Contracts applying to any territory less than the whole kingdom were considered in reference to their reasonableness, having regard to the purpose for which the contract was made. By the unanimous decision of the House of Lords, in the case of *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.* (1894), App. Cas., 535, affirming the unanimous judgment of the Court of Appeals in (1893) 1 Ch., 630, it is now held in England that a covenant unrestricted as to space, not to engage in a particular kind of business for twenty-five years, made in connection with the sale of the property of a manufacturing establishment, is valid, if, having regard to the nature of the business and the limited number of its customers, it is not wider than is necessary for the protection of the covenantee, nor injurious to the public interests of the country, as were found to be the facts in that case."

Our Court has announced the same principle in *Cowan v. Fairbrother,* 118 N. C., 412; *Kramer v. Old,* 119 N. C., 1; and in *Shute v. Heath,* 131 N. C., 282.

The Court said, in the first of these cases, speaking of the seller and

the purchaser: "The one sells his prospective patronage and the other buys the right to compete with all others for it, and to be protected against competition from his vendor. The law intends that the one shall have the lawful authority to dispose of his right to compete, but restricts his power of disposition territorially, so as to make it only coextensive with the right to protection on the part of the purchaser. To the extent that the contract covers territory from which the vendor has derived and will probably in future derive no profit or patronage, it needlessly deprives the public of the benefit of open competition in useful business, and of the services of him who sells without any possible advantage to his successor. When the reason upon which a law is founded ceases, the rule itself ceases to operate. The older cases in which the courts attempted to fix arbitrarily geographical bounds beyond which a contract to forbear from competition would not be enforced have given way to the more rational idea of making every case dependent upon the surrounding circumstances, showing the extent, as to time and territory, of the protection needed. . . . Where the nature of the business was such that complete protection would not be otherwise afforded, the restraint upon the right to compete has been held good in one or more cases where it applied to a State or to a boundary including several States," and in the second: "The courts in later years have disregarded the old rules by which it was sometimes attempted arbitrarily to fix by measurement the geographical area over which a contract in partial restraint of trade might be made to extend, and to prescribe a limit of time beyond which it could not be made to operate. The modern doctrine is founded upon the basic principle that one who, by his skill and industry, builds up a business, acquires a property at least in the good-will of his patrons, which is the product of his own efforts (*Cowan v. Fairbrother*, 118 N. C., 406), and has the fundamental right to dispose of the fruits of his own labor, subject only to such restrictions as are imposed for the protection of society, either by express enactments of law or by public policy. (*Hughes v. Hodges*, 102 N. C., 239; *Bruce v. Strickland*, 81 N. C., 267.) But the property that one thus creates by skill, or talent and industry, is not marketable unless the owner is at liberty to sell his right of competition to the full extent of the field from which he derives his profits, and for a reasonable length of time. . . . The test of the reasonableness of the territorial limit covered by such contracts is involved in the question whether the area described in the contract is greater than it is necessary to make it in order to protect the purchaser from competition in his efforts to hold and to get the full benefits of the business or right of competition bought by him," and in the third: "Contracts in partial restraint of trade can be made

and enforced of common right. This Court said, in *Kramer v. Old,* 119 N. C., 1: 'The modern doctrine is founded upon the basic principle that one who, by his skill and industry, builds up a business, acquires a property at least in the good-will of his patrons, which is the product of his own efforts, and has the fundamental right to dispose of the fruit of his own labor, subject only to such restrictions as are imposed for the protection of society, either by express enactment of law or by public policy.' An indefinite restriction as to duration will not make such contract void. *Kramer v. Old, supra.* But there must be a definite limitation as to space; and the reasonableness of such limitation will depend upon the nature of the business and good-will sold. A contract, for instance, for a valid consideration not to engage in the manufacture of firearms in general use would be allowed to cover a larger extent of territory than would a contract not to engage in the manufacture of timber or the ginning of cotton. And the test of that reasonableness is whether the space or territory is greater than is necessary to enable the assignee to protect himself from competition on the part of the assignor, and thereby to get the benefit of what he has bought."

Applying these principles, we are of opinion that the contract is not illegal, as it is limited as to time, ten years, and it is not coextensive with the territory in which the defendant could enter into competition with the plaintiff, as the territory embraced in the contract is one hundred miles from Morehead City, and the field of competition extends to South Carolina, Georgia, and the northern and eastern markets.

It also appears that the plaintiff has not attempted to prevent others from engaging in the same business and that the public has not been deprived of the benefit of competition, as there are as many persons doing business as fish dealers in Morehead City now as at the time of the organization of the plaintiff company.

Affirmed.

CLARK, C. J., dissenting: Prior to 12 March, 1914, the fish business at Morehead was conducted by 7 different firms, consisting of 11 individuals. They operated boats in all the waters of North Carolina and comprised all the fish dealers at Morehead (except two small dealers), and conducted 90 per cent or more of the fish business at that point, and did a large fish business, not only in North Carolina, but in South Carolina, Georgia, and in the northern and eastern markets. These dealers bought in competition with each other from the fishermen operating boats at various places, covering practically the entire fishing area of eastern Carolina, packing and shipping the product to various markets of the country.

The radius of 100 miles named in the contract, the validity of which is in question, made a circumference beginning beyond Southport in

the southwest to Nag's Head to the north, and reaching inland to Rocky Mount, taking in Wilson, Goldsboro, Clinton and Wilmington, besides 100 miles out to sea, covering also Albemarle and Pamlico and other sounds and rivers flowing into them.

This contract of 12 March, 1914, created a "combine" of all the fish dealers above mentioned, each of whom entered into an agreement that they would not "directly, indirectly, solely or jointly, as principal, agent, manager or otherwise be concerned or interested in the same business heretofore carried on as aforesaid by them, within the counties of Carteret and Craven, in the State of North Carolina, and within 100 miles from the town of Morehead aforesaid, for 10 years from the date hereof, nor permit their names to be used in connection with such business." This simply created a "Fish Trust," and is as much a violation of the State and Federal Antitrust Law as the American Tobacco Company, the Standard Oil Trust, or any of the other great trusts which have been dissolved by the decisions of the United States Supreme Court. The object, of course, is exactly the same, *i. e.*, to put down the price of fish when sold by the fishermen, and to put up the price when selling to the consumers, and make profits by the familiar process of destroying competition.

There is no analogy between this proceeding and the ordinary one of selling one's good-will in a local business, as a dentist, physician, or editor, and protecting the conveyance of the good-will by agreeing not to compete for a limited time and in a limited territory—both of which limitations must be reasonable. This is not an agreement that is reasonable, either in the extent of the territory or the duration of time, nor has it the feature of such contracts, when valid, that the vendor will not enter into competition with the vendee. Here the competitors all combine and create a monopoly in the vendors.

The defendant, one of the firm of Way Bros. & Co., having no knowledge of any other business, having been engaged in the same all of his life, was forced, in order to earn a livelihood, to engage in business as a fish dealer in Morehead, and was handling from 50 to 70 boxes of fish per day, and was buying fish from fishermen in the waters of eastern Carolina and at Morehead, in competition with the plaintiff, when the latter resorted to the court of equity to restrain him. The defendant was not conducting the business in the name of Way Bros. & Co., who had entered the combine, and if he was he was not subject to an injunction in repudiating an illegal contract, whose formation was indictable under the "antitrust" statute, but was doing business under the firm name of B. C. Way & Co. As soon as he entered the business in competition with the "combine" the price of fish to the fishermen advanced at once from one to three cents per pound, while at other points within the

100-mile radius, where the defendant could not compete for lack of funds, the price was kept down. The injunction was sued out by the plaintiff to prevent open competition in the market, to preserve which the antitrust statute was passed.

The contract under which the plaintiffs ask for this equitable relief is void: (1) because against public policy, (2) because the area attempted to be embraced therein is unreasonable, (3) because such contract creates a virtual monopoly of the fish business, over nearly the whole sea front of this State, in the hands of the plaintiff company, and prevents competition both in buying and selling fish. It takes from the fishermen reasonable returns in the sale of their "catch" by reason of the lack of competition and enhances the price to consumers for the same reason.

The covenant on its face shows no consideration except compensation for the personal property put into the "combine," against which stock was issued. There was no consideration named for the agreement not to compete. Indeed, the true consideration was the monopoly of the business, which is illegal under the statute and makes the whole contract void.

Even if this combine could be likened to the cases where a doctor or a dentist sells his business and good-will, and in order to guarantee such conveyance of the "good-will" stipulates that he will not practice within a certain territory within a certain time, this contract would be unreasonable by reason of the great space covered by a radius of 100 miles in every direction and ten years duration.

But in truth there can be no analogy between cases where one man sells his personal business to another with a reasonable stipulation to preserve the good-will of the business and this instance where practically all the dealers in a prime article of necessity, fish, oysters and the like, at the chief center of that industry enter into a combination whose evident intent and necessary effect is to create a monopoly for the purpose of reducing (as has been shown was the case here) the selling price of fish in the hands of those who catch them and to raise the selling price to the consumer.

There are affidavits in this record by more than 100 fishermen that the plaintiffs' combination, locally known as the "Fish Trust," has affected competition and the price. Naturally this would be so, and it is hard to realize any other motive for its formation than to make larger profits for the company as a middleman by reason of the destruction of competition. It is true that there is no express agreement to fix prices, as in *S. v. Craft,* 168 N. C., 208. Neither was there such express agreement in the combination and the absorption of rival companies which were held illegal and ordered to be dissolved in the *Standard Oil case,* 221 U. S., 1, and *American Tobacco Co. case, ib.,* 106.

In *Cowan v. Fairbrother,* 118 N. C., 407, relied upon by the plaintiff, there was an agreement not to publish a competing paper in this State for ten years. In its very nature this could not seriously affect the public, because there is free opportunity to establish newspapers, which are largely the product of the individual ability of the editors. But the fish business is a necessity to the public and the sale by the fisherman of their product in a competitive market is the right of the more than 1,000 men whom this record shows are engaged in this State in catching fish for market.

In *Wooten v. Harris,* 153 N. C., 46, it was held that while a merchant could sell his good-will in that business and could protect the conveyance thereof by agreeing not to again engage in such business in that town or "near enough thereto to interfere with the vendee's business," yet an agreement might be invalid "if it was shown that this was one of many similar contracts tending to engross or monopolize any given business, or the sale of any article within the territory named."

The General Assembly of 1913, ch. 41, intended to make more strenuous, and not less so, the laws against illegal trusts. The second proviso in subsection F, sec. 5, of that chapter, "*Provided further*, that nothing herein shall be construed to prevent a person, firm or corporation from selling his or its business and good-will to a competitor and agreeing in writing not to enter business in competition with the purchaser in a limited territory as is now allowed under the common law," applies only to a *bona fide* sale of the "good-will" to the competitor, when the vendor goes out of the business himself. It permits in such cases protection of the good-will by permitting the vendor to agree not to compete within reasonable limits and within reasonable time. It has no application to a "combine" like this where the vendor goes into the combination or where the extent of territory and length of time are unreasonable. The territory here covered embraces practically nearly the entire territory in which fish can be taken in the waters of this State, including Albemarle and Pamlico sounds, the Cape Fear, Neuse and Tar rivers, and the lower part of Roanoke and Chowan rivers—in short, almost the entire water front of North Carolina and the rivers, streams and sounds that flow to the east.

Was it ever heard of that a stockholder in a railroad company, or other enterprise affecting the public generally, could contract that he would not take part in building another railroad, or sharing in the promotion of another enterprise of public interest? Aside from being in violation of the antitrust statute, such contract would be contrary to public policy, which encourages not only competition, but the promotion of public enterprises such as increasing the supply of food. Certainly a court of equity would not give its aid to the enforcement of such contracts.

It is not objectionable that many men should join their capital to create a large corporation. That may be, indeed, desirable by making possible the reduction of expenses and furnishing accommodation to the public at a lesser rate. What is objectionable is binding its members not to take any part in other similar enterprises, which will be for the public benefit, thus reducing competition, when the public interest requires the increase of facilities in furnishing food or other public benefits.

A large number of people are interested in catching fish as a livelihood, and a very much larger proportion of them are dependent, more or less, upon fish and oysters for food. A great combination like this, that strikes at those who catch fish and take oysters as a means of livelihood and at those who consume them, is in its nature even more deleterious, if possible, to the public interest than the great Tobacco Trust which dealt with an article of luxury, and not of food.

The antitrust law of 1913, ch. 41, was passed to give not less, but more effective protection to the public. The proviso therein, permitting a person to sell his business and good-will to another, cannot be construed to destroy the entire act. Succeeding the proviso to which such great effect is attributed, and in the same section, is this further proviso: "*Provided,* such agreement shall not violate the principles of the common law against trusts and shall not violate the provisions of this act."

A great lawyer in England once said, as quoted by Macaulay, that he "could drive a coach and six through any act of Parliament." Certainly the entire fishing fleet of North Carolina should not be sailed through this act because an incidental provision therein permits a man to sell the "good-will" of his business and to secure its conveyance by agreeing to abstain from exercising that business for a reasonable time and within reasonable limits. It ought not to be construed to permit such a "combination" as is here provided for of the entire fish and oyster industry of North Carolina by the middlemen who buy the product from the fishermen and resell it to the public.

R. E. BELCHER AND WIFE, LUCY, AND T. E. JOYNER v. J. E. COBB, ADMINISTRATOR OF WILLIAM WILLIAMS, ET ALS., HEIRS AT LAW OF WILLIAM WILLIAMS.

(Filed 20 October, 1915.)

1. Judgments—Not Signed by Judge—Validity.

The validity of a judgment entered in the course and practice of the courts is not affected by the fact that it is not signed by the presiding judge at the bottom.

2. Trusts and Trustees—Estates—Title in Controversy—Duty of Trustee.

It is the duty of the trustee to defend and protect the title to the trust estate when in controversy and to defend the action in good faith.

3. Same—Courts.

Where an estate is held in trust for infant *cestuis que trustent*, and their rights thereunder are in controversy, it is for the courts, and not for the trustee, to pass upon them.

4. Trusts and Trustees—Consent Judgment—Surrender of Rights.

Where a trustee has successfully established the trust estate in an action calling its validity in question, by the judgment of the court, he may not thereafter consent to a judgment to be entered declaring invalid the instrument creating the trust, and thus destroy the rights of the *cestuis que trustent* thereunder.

5. Same—Pleas in Bar—Estoppel.

A consent judgment rests upon an agreement of the parties to the action, and is not the judgment or decree of the court. Hence, a judgment alone consented to by a trustee in excess of his authority and in surrender of the rights of the *cestuis que trustent* under a judgment theretofore obtained will not operate in bar of their rights, for as to them the judgment is null and void.

6. Trusts and Trustees—Consent Judgment—Relinquishing Rights—Consideration.

Where the *cestuis que trustent* are seized of a vested remainder in fee under the deed of trust, and in an action involving the validity of the deed the trustee has successfully defended to judgment and then consents to a judgment relinquishing the rights of the *cestuis que trustent* thereunder, the legal effect of the consent judgment is that of a conveyance of the trust estate without consideration, and is null and void.

APPEAL by plaintiffs from *Connor, J.*, at the March Term, 1915, of PITT.

Civil action. His Honor rendered judgment sustaining a plea in bar, and the plaintiffs appealed.

Albion Dunn for the plaintiffs.

Henry A. Gilliam, Donnell Gilliam, F. G. James & Son and F. M. Wooten for defendants.

BROWN, J. This action is brought to recover certain funds belonging to the estate of William Williams, deceased, in the possession of his administrator, and claimed by his codefendants, the heirs at law and distributees of the intestate.

This property is claimed by plaintiffs as the beneficiaries and *cestuis que trustent* in a deed executed on 17 November, 1902, by William Williams to R. L. Joyner, trustee, conveying the real and personal estate of said Williams in trust to manage and invest the same and apply the income to the support of said Williams during his life, and after his death "to convey and deliver the balance of said estate to the following named persons and in the following proportions, that is to say, he shall convey and deliver to Eli Joyner, son of R. L. Joyner, one-half of the same, and to Lucy Flanagan, daughter of James Flanagan, the other half thereof, and if either shall die before the said William Williams leaving

no issue, then the whole to be conveyed and delivered to the survivor." The said Eli and Lucy are plaintiffs in this action.

It appears that William Williams has been declared an inebriate-lunatic by proceedings alleged to be irregular, and that J. R. Davis was appointed his guardian, and that on 17 December, 1903, he instituted an action in the Superior Court of Pitt County to declare void said deed to Joyner and to recover the estate of said Williams from Joyner's possession.

The trustee, Joyner, answered, and stated, among other things: "That as trustee of the said William Williams nothing has ever come into his hands belonging to said estate, and that he will await an adjudication of this cause; but if the court shall be of the opinion that the said William Williams was fully competent to execute the trust made to this defendant, then he is willing to accept said trusteeship and endeavor to carry out its provisions."

This action came on to be tried before *Neal, judge,* and a jury, at March Term, 1907, and at the conclusion of the evidence a motion to nonsuit the plaintiff was sustained.

On 18 December, 1902, proceedings for partition were commenced in said county for division of the estate of Eli Williams among his heirs at law, all of whom were parties. William Williams was an heir at law of said Eli and derived his entire estate from him. In that proceeding it was adjudged, among other things, "that R. L. Joyner, trustee of William Williams, is the owner of an undivided one-half interest in and to the lands described in the petition," and directed the payment by the commissioner to said trustee of a certain part of the proceeds of the sale.

Judge Neal sustained the motion to nonsuit upon the ground that the aforesaid partition proceedings and decree were an estoppel upon the heirs, distributees, and representatives of William Williams, and confirmed the title of Joyner, trustee, under the deed. There is a judgment to that effect in the record, as follows:

NORTH CAROLINA—Pitt County.

Superior Court, March Term, 1907.

(Title of cause.)

Before Hon. W. H. Neal, judge presiding.

This cause coming on for hearing, and at the conclusion of the evidence introduced on behalf of both the plaintiff and the defendants, his Honor announced his purpose to instruct the jury that the plaintiff was not entitled to recover of the defendants or either of them in this action for the reason that the record of the proceedings in the suit of *Edward Flanagan et als. v. W. W. Cobb et als.,* for the sale of the lands of Eli Williams, deceased, instituted before the clerk of the Superior Court of

said county on 18 December, 1902, together with all orders and decrees entered therein, constituted an estoppel of record against the plaintiff which precluded his recovery in this action both in respect to the sum of $2,150, one-half of the interest of William Williams in the proceeds of the sales of the lands of Eli Williams, deceased, paid each to Oscar Hooker, assignee, and R. L. Joyner, trustee, as alleged in paragraph 18 of the complaint, as well as the $5,000 or more, the interest of William Williams in the personal assets in the hands of the administrator of Eli Williams, whereupon, in consequence of such intimation of his Honor, the plaintiff was allowed to submit to a judgment of nonsuit, for the purpose of an appeal to the Supreme Court to test the correctness of his Honor's rulings as aforesaid. It is further ordered and adjudged that the cost of this action be taxed against the plaintiff J. R. Davis, guardian of William Williams.

It is true that this judgment is unsigned at bottom, but that does not invalidate it. *Keener v. Goodson*, 89 N. C., 273. There is another formal judgment of nonsuit signed by *Judge Neal*, copied in appellants' brief, that we fail to find set out in the record. It is admitted that the appeal to the Supreme Court by the plaintiff J. R. Davis, guardian, was never perfected, but was abandoned. Thereupon at April Term, 1907, *Judge Lyon* presiding, a judgment by consent of all parties, including R. L. Joyner, trustee, was entered, declaring the deed in trust of 17 November, 1902, null and void; that it be vacated and set aside, and that the plaintiff Davis, guardian, recover of Joyner, trustee, as well as of the administrators of Eli Williams, the entire estate of William Williams in their possession.

This consent judgment is pleaded as an estoppel in bar of this present action. The judge below sustained the plea and dismissed it. The correctness of this ruling is the only question before us.

It is contended that the consent judgment is void: (1) because it is admitted that the *cestuis que trustent* were not parties to the action; (2) because it is admitted that they were infants at the time, and, therefore, the consent judgment is void as to them, it appearing upon its face that the trustee made no defense, but wrongfully surrendered their rights.

As a general proposition, it is held that, it being the duty and within the power of the trustee to defend the estate committed to his care, he may institute or defend actions relating thereto without joining the *cestuis que trustent* as parties, and in the absence of fraud, they are bound by the judgment rendered therein. Accordingly it was held in *Hancock v. Wooten*, 107 N. C., 9, that in an action to set aside a fraudulent assignment, the *cestuis que trustent* are not necessary parties, and they will, in the absence of *bad faith* on the part of the trustee, be bound by his acts. In that case the assignment was for the benefit of a large number of

creditors and the deed conferred many duties and powers upon the trustee. It may well be doubted if that principle will apply to such a trust as the one before us, which, so far as these plaintiffs are concerned, is a naked trust, the only duty imposed and the only power conferred upon the trustee being to convey and deliver to the plaintiffs, at Williams' death, the property described in the deed. Mr. Perry holds that if the object of the action is to destroy or charge the estate of the *cestui que trust,* he is a necessary party. 2 Perry on Trusts, sec. 883. But it is not necessary to decide that controversy now. We are of opinion that the second ground upon which the plaintiffs rest their case is sound in law as well as in morals.

Mr. Justice Lamar, now of the Supreme Court of the United States, said, in respect to this subject: "It required neither express power in the deed nor an order from the chancellor to authorize or require the trustee to defend the estate committed to his care. That was a prime duty imposed by his appointment." *Miller v. Butler,* 49 S. E. Rep., 755.

Perry declares that it is the duty of the trustee to defend and protect the title to the trust estate and to defend the action in good faith. Perry on Trusts, sec. 328. But this proposition is self-evident. It is all the more true where the rights of infants are at stake.

The trustee's plain duty was to defend their interests before the court. It has been held that a guardian *ad litem* or next friend has no power to submit for the infant his cause to arbitration, even though the submission be a rule of court. *Milsaps v. Estes,* 134 N. C., 486.

It is contended that the trustee Joyner had no defense, as Williams had been declared to be a person *non compos.* It is for the court and not for the trustee or guardian to pass on the infant's rights. But in this instance the trustee had a very potent defense. He had made it at the trial before *Judge Neal* and the court had pronounced judgment in his favor, confirming the title of the *cestuis que trustent.* The plaintiff Davis had taken an appeal to the Supreme Court and abandoned it. Not only did the trustee Joyner have an apparently good defense, but he had asserted it and won his case. Notwithstanding the fact that he had a judgment in his favor, at next term of the court, before *Judge Lyon,* this trustee consented to another judgment setting aside the one in his favor which validated the title of the *cestuis que trustent* and declaring that the plaintiff J. R. Davis, guardian of William Williams, is the owner of and entitled to the estate of William Williams, and that the deed in trust to Joyner of 17 November, 1902, be declared null and void.

It is not necessary for us to hold that such a complete and unwarranted surrender of the estate of his *cestuis que trustent* by the trustee is some evidence of fraud, but we do say that it was plainly beyond his power to make, and in this particular it matters not whether the *cestuis que trustent* are infants or adults.

A judgment by consent is not the judgment or decree of the court. It is the agreement of the parties, their decree, entered upon the record with the sanction of the court. It is the act of the parties rather than that of the court. *Harrison v. Dill, ante,* 542; *Lynch v. Loftin,* 153 N. C., 270.

The *cestuis que trustent* under the deed were seized of a vested remainder in fee in the estate of William Williams, the title to which had been confirmed in them by the judgment of the Superior Court at March Term. The legal effect of this consent decree at April Term was to convey the entire estate of the *cestuis que trustent* to the plaintiff Davis. The consent judgment was nothing more or less than an attempted absolute conveyance, without even any consideration of the property of the *cestuis que trustent* by the trustee.

It is beyond our comprehension why such a complete surrender should have been made. But it is quite plain that the trustee had no power to make it, and that as to these *cestuis que trustent* the consent judgment is null and void. The trustee had no more power to convey the estate of his *cestuis que trustent* in that manner than he would have to convey it by a deed in fee. A guardian cannot convey away his ward's estate except by proper legal proceedings, and this trustee is bound by similar limitations, as he was vested with no such power either by legal decree or by the terms of the trust.

We are of opinion that as to the plaintiffs in this action the consent decree is void, and that the judge below erred in sustaining the plea in bar. The cause is remanded, to the end that the other issues raised by the pleadings be determined according to law.

Reversed.

CORK TREADWELL, ADMINISTRATOR OF HENDERSON TREADWELL, DECEASED, v. THE ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 20 October, 1915.)

1. Railroads—Negligence—Tracks—Trespasser—Licensee—Place of Danger—Warnings.

A railroad track is, in itself, a warning to those who use it, either as trespassers or licensees, of the danger of walking thereon, or of using it as a roadway, and requires them to observe the ordinary care that a prudent man under the circumstances would use to avoid injury from passing trains, and to leave the track in time to avoid being injured thereby, when the occasion arises.

2. Same—Pedestrians—Stopping Trains.

A railroad company has the superior right to the use of its track over that of trespassers and licensees walking thereon; and the employees of the company are not required to stop the running of its trains for the pub-

lic benefit whenever they see a pedestrian upon the track in front of the moving train, and when there is nothing to indicate that he was not in full possession of his faculties.

3. Railroads—Trespasser—Licensee — Negligence — Evidence — Headlights—Crossing Signals.

While a railroad company does not owe it as a duty to a pedestrian using its track as a walkway to give crossing signals, yet its failure to do so and to use a headlight at night may afford some evidence that the train was being negligently run, and sufficient to be considered in an action to recover damages for the negligent killing of a trespasser or licensee on the track and to be submitted to the jury under relevant circumstances.

4. Same—Duty of Trespasser—Contributory Negligence.

Where in an action to recover damages for the negligent killing of the plaintiff's intestate at night by the defendant railroad company's train running without a headlight, and not giving signals of its approach, the questions as to whether there was a headlight, or that the signals were given, and whether the deceased should have seen or heard the train with or without them, are for the jury, when they are relevant to the issue and arise from the evidence; for if the deceased could have seen or heard the train, and did not leave the track, when able to do so, his injury will be attributed to his own fault.

5. Railroads—Trespasser—Headlight—Trains Running at Night—Negligence—Evidence—Contributory Negligence.

The running of a train at night without a headlight is some evidence of negligence, in an action to recover damages for the negligent killing by the train of the plaintiff's intestate, and may support a verdict adverse to the defendant, unless it appears that the deceased actually saw or heard or, by the exercise of ordinary care for his safety, he could have seen or heard the train, and should have avoided the injury, in consequence.

6. Same—Proximate Cause.

Where injury is inflicted by a railroad company's engineer on a person helpless on the track, which could have been avoided by his exercise of proper care after he had or should have observed his helpless condition, this will not justify an affirmative answer to the issue as to the defendant's negligence unless the negligence was the proximate cause of the injury; nor will the contributory negligence of the plaintiff justify an affirmative answer to that issue unless it was the proximate cause of the injury alleged.

7. Same—Instructions—Appeal and Error.

In this action to recover damages for the negligent killing of plaintiff's intestate about 12 o'clock at night, there was evidence tending to show that the deceased was on his way home, a part of the distance being across the defendant railroad company's right of way, between two railroad crossings, and that trains passed about 11:25 p. m. and 3 a. m., one of which was run without an electric headlight and without giving crossing signals. The charge in this case held as error to the plaintiff's prejudice in not sufficiently instructing the jury upon the issues as to proximate cause; telling them, in effect, to answer the issue as to contributory negligence "Yes," if the deceased did not exercise ordinary care in going upon the track.

APPEAL by plaintiff from *Peebles, J.*, at the February Term, 1915, of SAMPSON.

The action was brought to recover damages for the negligent killing of the deceased by the defendant's train, which, it is alleged, was running between Parkersburg and Garland, on the night of 12 September, 1913. He had attended a revival at Garland that night and went home from there in company with Lula Lamb. They walked on the railroad track from Garland towards Parkersburg about 2½ miles and then turned from the track to the east and walked to her home, where they arrived between 11 and 12 o'clock. They met a train, which was going south, on their way, about the time they left Garland. He left Lula Lamb's house for his own home across the railroad track about 12 o'clock the same night. He lived three-quarters of a mile from her home. He was found the next morning lying on the bottom of a ditch by the side of the railroad and between two railroad crossings, one of which was 100 yards from the place he was found and the other about a quarter of a mile distant. The distance from the track to the place where he was lying was about 12 feet, and his hat was on the railroad track, or at the end of the ties about seven steps from him, towards Wilmington. It had rust on it or something which was brown and had the appearance of rust. He was hurt when found, and while he was conscious, he was helpless and dazed and could not tell how he was hurt. He had been struck on the shoulders and later died of the wound. His coat looked as though something had caught it, and it was torn. When the doctor suggested that some one might have knocked him down to rob him, he said that he had a quarter in his pocket, which was found there. There was further evidence that two trains passed that point during the night, one at about 11:25 and the other some time later, about 3 o'clock, and that one of the trains had no headlight and gave no signal by bell or whistle for crossings. There was other evidence that the train had a headlight, but not an electric headlight. The track is straight from Garland to Parkersburg, and was used by pedestrians habitually. The court submitted four issues, and the jury found that the injury was caused by the defendant's negligence, to which the deceased had contributed by his own negligence; did not answer the third issue, as to the last clear chance, and assessed damages at $650. The court charged the jury that if defendant had no electric headlight on its engine, and that was the proximate cause of the injury to deceased, they would answer the first issue "Yes," and that there was no evidence that Henderson Treadwell was lying helpless on the track when he was struck or that he was otherwise unable to care for himself; that if he went on the track and *probably* did not exercise ordinary care in looking out and listening for trains, they would answer the second issue "Yes," and that there was no evidence that defendant had discovered Treadwell on the track in a helpless condition, and if he was walking on the track, and they saw him, the engineer had the

right to suppose that he would leave the track before the train reached him, and he was not, in such circumstances, required to ring the bell or give him other signal. Judgment was entered for defendant on the verdict, and plaintiff, after properly reserving exceptions, has appealed to this Court.

I. C. Wright, H. E. Faison and J. O. Carr for plaintiff.
Grady & Graham for defendant.

WALKER, J., after stating the case: We have so recently and with so much amplitude discussed the principles of law relating to trespassers and licensees on railroad tracks, and applied them in so many different ways, it would seem that the subject had been well-nigh exhausted, and the rules pertinent to such cases had been finally and firmly settled. We shall not, therefore, "thresh this old straw" again, but content ourselves with a reference, though not a literal one, to two decisions of this Court where the doctrine has been traced from its origin through a long line of cases to the present time. *Abernathy v. Railroad Co.,* 164 N. C., 91; *Ward v. Railroad Co.,* 167 N. C., 148. A court of the highest authority has said that where it is known, as it should be, that a railroad company's right of way is being constantly used for its trains, and is at all times liable to be used for their running and operation in transporting freight and passengers, as a public carrier, under the highest legal obligation to serve the public diligently and faithfully as such, "the track itself, as it seems necessary to repeat with decided emphasis, is *itself* a warning. It is a place of danger, and a signal to all on it to look out for trains, and it can never be assumed that they are not coming on a track at a particular time when it is being used for the convenience of trespassers or licensees, and, therefore, that there can be no risk to a pedestrian from them."

In the cases above cited this Court held, as it did also in *Beach v. Railroad Co.,* 148 N. C., 153, that a railroad track is intended for the running and operation of trains, and not for a walkway, and the company owning the track has the right, unless the statute has in some way restricted that right, to the full and unimpeded use of it. The public have rights as well as the individual, and usually, and reasonably, the former are considered superior to the latter. That private convenience must yield to the public good and public accommodation is an ancient maxim of the law. If we should for a moment listen with favor to the argument, and eventually establish the principle, that an engineer must stop or even slacken his speed until it may suit the convenience of a trespasser on the track to get off, the operation of railroads would be seriously retarded, if not made practically impossible, and the injury to the public would be incalculable.

The prior right to the use of the track is in the railway, especially as between it and a trespasser who is apparently in possession of his senses and easily able to step off the track. He has the advantage of the company's train, and besides is using its property gratuitously for his own pleasure and convenience, and if he has implied license to do so, it must be considered as held, and the privilege must be exercised, subject strictly to the company's right to use its tracks for running its trains. If the engineers must stop their trains to await the pleasure or convenience of foot passengers in leaving tracks, when they can step off so easily and avoid injury and not obstruct or retard the passage of trains, the company cannot well perform its public duty as a carrier, and the public convenience, though superior and of prior right, must give way to private interests, contrary to the just maxim of the law. The railroad track itself was a warning of danger, made imminent by the approaching train. It was then his duty to keep his "wits" about him and to use them for his own safety. He knew, or ought to have known, that he was a trespasser, and it was his duty to have gotten out of the way of the train. The defendant was under no obligation to stop its train at the sight of a man on its track. It was apparent to the engineer, in those cases, that the plaintiff was in full possession of his faculties and could take care of himself, and the engineer had the right to presume that he would leave the track in time to avoid the injury. That he did not do so was his own fault, and he should suffer the consequences of his folly.

The doctrine of the cases already cited and decided in this Court has been firmly established in other jurisdictions, and notably in *R. R. v. Houston,* 95 U. S., 697, where it is said that a person using the track of a railroad company must look and listen, and any failure to do so will deprive him of all right to recover for any injury caused thereby. A party cannot walk carelessly into a place of danger, said the Court in that case, and if he does and is injured, he has himself alone to blame for the result. The cases in our courts also hold that neither the fact of an engine being on the south siding and exhausting steam, nor the speed of the oncoming train, which was not, in this case, at all excessive, can make any difference. *Syme, McAdoo,* and *High cases,* and *R. R. v. Houston, supra.* And many cases are there arrayed to show how well established is this principle. It is no new one, for as far back as *McAdoo v. Railroad Co.*, 105 N. C., 140, it was held that when a person is about to use the track of a railroad, even at a regular crossing, it is his duty to examine and see that no train is approaching before venturing upon it, and he is negligent when he can, by looking along the track, see a moving train, which in his attempt to blindly pass across the road injures him. Even where it is conceded that one is not a trespasser, as

in that case, in using the track as a footway from a foundry to his house, it behooves him to be still more watchful. The license to use does not carry with it the right to obstruct the road and impede the passage of trains. A railroad company has the right to the use of its track, and its servants are justified in assuming that a human being who has the possession of all his senses will step off the track before a train reaches him, citing Wharton on Negligence, sec. 389, a; 2 Wood on Railroads, sec. 320, 333; *Bullock v. Railroad,* 105 N. C., 180; *Parker v. Railroad Co.,* 86 N. C., 221. It was strictly applied, in *High v. Railroad Co.,* 112 N. C., 385, to a state of facts by which it appeared that the pedestrian may not actually have seen the approaching train, for it was said that if she had looked and listened for approaching trains, as a person using a track for a footway should, in the exercise of ordinary care, always do, she would have seen that the train, contrary to the usual custom, was moving on the siding, instead of the main track. The fact that it was a windy day and that she was wearing a long poke-bonnet, or that the train was late, gave her no greater privilege than she would otherwise have enjoyed as licensee; but, on the contrary, should have made her more watchful. There was nothing in the conduct or condition of the plaintiff that imposed upon the engineer, in determining what course he should pursue, the duty of departing from the usual rule that the servant of a company is warranted in expecting that trespassers or licensees, apparently sound in mind and body and in control of their senses, will leave the track, and he may act upon this assumption until it is too late to prevent a collision, citing *Meredith v. R. R.,* 108 N. C., 616; *Norwood v. R. R.,* 111 N. C., 236; and those cases fully sustain the correctness of the proposition.

More recently, *Justice Hoke* said, in *Talley v. Railroad Co.,* 163 N. C., 567, citing *Beach v. Railroad Co.,* 148 N. C., 153, and *Exum v. Railroad Co.,* 154 N. C., 408: "We have held in many well considered cases that the engineer of a moving train who sees, on the track ahead, a pedestrian who is alive and in the apparent possession of his strength and faculties, the engineer not having information to the contrary, is not required to stop his train or even slacken its speed because of such person's presence on the track. Under the conditions suggested, the engineer may act on the assumption that the pedestrian will use his faculties for his own protection and will leave the track in time to save himself from injury."

It is almost incredible that persons will take so many chances and incur so great risk under such dangerous circumstances. We could not listen to the excuse that the trespasser or licensee did not expect a train to come, at the very moment when it did, and therefore used the track incautiously or without a proper regard for his own safety, for this

would impede the carrier in the discharge of his duty to the public, for the proper performance of which the law holds him to a very strict accountability. There are regular and extra trains necessarily, and schedules are not made for him. As between the two—carrier and trespasser—the law looks with favor on the former, as being justified in acting upon appearances when the engineer sees a person ahead on the track, and further, as, at the time, representing the public interest, to which the private convenience of the pedestrian, whether trespasser or licensee, must yield. If he is on the right of way at a place made dangerous by the approach of a train, or with the knowledge that a train may come towards him at any time, he must look out for his own safety, unless he is helpless or unable to do so, and this reasonably appears to the engineer; and his failure to take the needful precaution will deprive him of all remedy, if he is hurt by this want of care, and he will not be heard to say that he did not know he would be hurt, the very fact that he is in the way of the train, which has the preferred claim to the use of the right of way, being notice to him. He must look and listen, and take no chances, and, especially, if he knows that the train is approaching, must he get out of its way and let it pass. If the train is proceeding on the track, at any speed not forbidden by law, it is rightfully there and within the protection of the law, the company being a servant of the public, and as such in the rightful discharge of its duty.

Applying these principles to the facts in hand, we find that the learned judge did not explain to the jury very fully their bearing upon the issues. If the deceased could see the train, as it approached him, if he was on the track, it was his duty to get off and let it go by. If he was a licensee, using the track for his own purposes by mere sufferance, he should have been cautious, nevertheless, and kept constantly in the exercise of ordinary care, such as that of a prudent man. He should have carefully looked and listened for the train, whether it had a headlight or not, or was or not giving any signal of its approach, for if, notwithstanding the absence of these, he could have seen or heard the train, if he had been ordinarily careful and had looked and listened, it was his plain duty to take notice of its coming and have left the track, if he was thereon, or so near thereto that he was in danger of receiving injury as it passed by.

The headlight and signals are intended as a warning, but if the train can as well be seen or heard without them, there is no reason why that, of itself, is not sufficient notice of the immediate danger. But as we held in *Morrow v. Railroad Co.*, 147 N. C., 623, while a pedestrian, not on a crossing, but between crossings, is not in law entitled to crossing signals, as the company owes no such duty to *him*, yet if an engine is being run without a headlight, and without giving crossing signals, this

is some evidence, for the jury, that the train it is drawing was being at the time negligently operated.

1. If deceased was asleep on the track, or otherwise helpless, he was negligent, but it was the duty of the defendant's engineer, after discovering his dangerous position, to have exercised ordinary care in saving him from harm, and it was further his duty, under our decisions, to keep a reasonably careful lookout so as to discern any person who may be on the track in a helpless condition. *Arrowood v. Railroad Co.*, 126 N. C., 629; *Gray v. Railroad Co.*, 167 N. C., 433; *Cullifer v. Railroad Co.*, 168 N. C., at p. 311.

2. If deceased was walking or standing on the track, or so near to it as to be struck by it while passing, and he appeared to be in possession of his ordinary faculties, or to be able to care for himself and get out of the way, the engineer had a right to assume that he would do so, even up to the last moment, when it was too late to save him.

3. Whether there was a headlight or signals, and whether deceased could see or hear the train with or without them, are questions for the jury. If he could see or hear the train, and did not leave the track, his injury would be attributed to his own fault, and not to that of the defendant.

4. If the train was running without headlight or signals, this was some evidence of negligence, and might support a verdict, unless deceased actually saw or heard, or by the exercise of ordinary care for his safety he could have seen or heard the train. This happened to be a bright moonlight night, and the train was running on a straight track for a long distance.

5. The negligence of defendant, if any, in failing to discern the deceased, if he was lying helpless on the track, by the exercise of ordinary care, would not have justified an affirmative answer to the first issue, unless the negligence was the proximate cause of the injury. *McNeill v. Railroad Co.*, 167 N. C., 390. And the same is true conversely as to the second issue, as the contributory negligence of plaintiff must have proximately caused the injury. *McCall v. Railroad Co.*, 129 N. C., 298. "It is not the absence of a headlight, nor the impact of the train, which determines liability, but the impact of the train brought about by or as the proximate result of the absence of a headlight." *McNeill's case, supra.* And this is true also as to the absence of signals at the crossings. Negligence, by itself, is dormant and harmless, and only becomes active and injurious when it is the efficient cause of a wrong. The two must be coupled together before the negligence becomes a cause of action or defeats one.

The court did not apply these principles correctly to the facts of the case as they were disclosed by the evidence and were relevant to the issues,

and he told the jury that the plaintiff's negligence, of itself, and apart from its being the proximate cause of the injury to him, would authorize an affirmative answer to the second issue. This was error.

We will add that if the deceased was not on the track and only near it, but not so near that the engineer, if provided with a proper headlight, and in the exercise of proper care as to the outlook, could have told that he was in danger, the defendant would not be liable; but this follows from what we have already said, as the question, at last, is one of negligence, that is, the absence of ordinary care, or that degree of care which the particular circumstances called for. The deceased does not appear to have been drinking at the revival, and it would have been a little unusual if he had been, nor does it clearly appear that he was on the track at all, or, if there, how he happened to be there. He had left his companion's home just three hours before and had only three-quarters of a mile to walk before reaching his home. The evidence lacks fullness and accuracy, and is somewhat confusing and unsatisfactory, as we view it, but perhaps it will be clarified at the next hearing, with a decided trend to one side or the other, and if it is not, the jury must solve the mystery, with the burden on the plaintiff to show them by a clear preponderance of the evidence what the facts are and that they constitute negligence that caused the injury. If he succeeds in doing so, the burden as to the other issue, contributory negligence, will be upon the defendant to establish it by the same quantum of proof.

As there was substantial error, a new trial, as to all the issues, is ordered.

New trial.

MRS. E. F. WEEKS v. THE WESTERN UNION TELEGRAPH COMPANY.

(Filed 27 October, 1915.)

1. Corporations—Torts—Contracts—Injured Party—Diminution of Damages.

In an action to recover damages for the negligent breach of a duty of a *quasi* public-service corporation it is necessary that the injury complained of shall have been the proximate cause of the negligence alleged; and where a contract of this character, relating to a public duty, has been broken by such corporations or tort committed by it, it is incumbent upon the injured party to do what he could to reduce or lessen the damage, and such damages as are reasonably incident to his own default in this respect will ordinarily be considered too remote for recovery.

2. Same—Telegraphs—Telegrams—Delay in Delivery.

In an action to recover damages of a telegraph company for the alleged negligent delay in the delivery of a telegram, whereby the plaintiff, the addressee of the message, was prevented from attending the funeral of her sister-in-law, there was evidence in the defendant's behalf tending to show that the plaintiff could have taken a later train or have hired an automobile at the cost of $10 and have reached her destination in time

to have avoided the injury; and in plaintiff's behalf, that she could not have made the necessary preparations in time to have taken that train, or have obtained the money from her husband necessary for her to have done so; and that she could not have afforded to have hired an automobile. *Held*, the question was properly submitted to the jury as to whether the defendant's negligence was the proximate cause of the injury, and whether the plaintiff had done what she reasonably could to have avoided the injury or minimize her damages.

3. Telegraphs—Relationship—Affection—Evidence—Declarations.

In an action to recover damages for mental anguish caused by the failure of the defendant telegraph company to promptly deliver a death message to the plaintiff, the sister-in-law of the deceased, evidence of the state of feelings having existed between the plaintiff and deceased are directly relevant to the issue; and both the conduct of the parties towards each other and their conversations and declarations about the other are usually admissible, the limitation being that they should have been at a time and under circumstances to exclude any reasonable suspicion of their sincerity.

4. Same—Corroboration.

Where the plaintiff sues a telegraph company for damages for mental anguish for its alleged negligent delay in delivering a telegram announcing the death of a sister-in-law, and evidence has been introduced which tends to show the close regard and affectionate feeling that had existed between them, testimony of the husband of the deceased as to this state of feeling, and that his wife desired his sister to have their little boy in case she died, was competent, either as direct evidence or in corroboration of the evidence of affection having existed between the deceased and her sister-in-law.

5. Appeal and Error—Objections and Exceptions—Evidence Partly Competent.

Where the evidence objected to as a whole is competent in part, the objection will not be sustained, though a part thereof is incompetent.

APPEAL by defendant from *Daniels, J.*, at the Fall Term, 1915, of WAKE.

Civil action to recover damages for negligent failure to deliver a telegraphic message sent from Durham, N. C., to plaintiff at Raleigh, and by reason of which plaintiff was prevented from being present at the funeral of her sister-in-law, Mrs. W. D. Pool. The message was sent from Durham, N. C., on the afternoon or evening of 20 October, 1913, at 7 p. m., addressed to plaintiff at Raleigh, No. 7 Johnson Street, in terms as follows: "Minnie died at 5:45 p. m. W. D. Pool."

The evidence on part of plaintiff tended to show that the message was not delivered till shortly before noon on the 21st, and, by reason of delay, plaintiff was prevented from attending her sister-in-law's funeral, which took place at Durham at 3 p. m. of the 21st; that the relationship between plaintiff and her sister-in-law had been one of cordial interest and affection. Speaking to this question, plaintiff testified that: "Mrs. Pool was my sister-in-law, and I loved her as truly as my own sister. I had boarded with her, and during the time I lived in Durham we visited each other very often, and after I moved from Durham I visited her as

often as I could and she visited me, and I was awfully sorry I could not attend her funeral. If I had gotten it in time, I would have gone that morning on the train." Defendants contended that the message was delivered about 9:50 a. m. of the 21st, and contended, further, and offered evidence tending to show that, whether same was received at 9:50 or at noon, plaintiff had ample time to have gone to funeral by taking train that left Raleigh on that day at 12:50, regular schedule 12:30.

Defendant offered evidence tending to show, also, that plaintiff might have gone to Durham in time by automobile, and proved same were available on that day at a cost of $10.

Plaintiff offered testimony in rebuttal tending to show that she could not, by any reasonable effort, have taken the train designated, and that she had no money with which to hire an automobile, etc.

The court charged the jury, and the following verdict was rendered:

1. Was the defendant guilty of negligent delay in the transmission or delivery of the message, as alleged in the complaint? Answer: "Yes."

2. If the message had been transmitted and delivered in a reasonable time, would the plaintiff have attended her sister-in-law's funeral. Answer: "Yes."

3. What amount of damages, if any, is the plaintiff entitled to recover? Answer: "$450."

Judgment on the verdict, and defendant excepted and appealed.

Douglass & Douglass for plaintiff.
Pace & Boushall for defendant.

HOKE, J. There was ample evidence to support the verdict of negligent delay in delivery of the message. This was not seriously questioned on the argument, the right of recovery being resisted chiefly on the ground that plaintiff, by making proper effort, could have taken the train which left Raleigh on that day at 12:50 (the schedule time seems to have been at 12:30), and would have arrived in Durham at or about 1:30, which would have given plaintiff full time to have been present at the funeral, and that, on the facts in evidence, no recovery for mental anguish should have been allowed. It is undoubtedly the general rule, in these cases as in other actions of negligence, that in order to a valid recovery the negligence complained of should have been the proximate cause of the injury, and they are subject, also, to another well recognized principle, that when a contract has been broken or tort committed it is incumbent upon the injured party to do what he can to reduce or lessen the damage, and that such damages as are reasonably incident to his own default in this respect will ordinarily be considered too remote for recovery. *Hocutt v. Telegraph Co.*, 147 N. C., p. 186; *Bowen v. King*, 146 N. C., p. 385; *Tillinghast v. Cotton Mills*, 143 N. C., p. 268; *Rail-*

road v. Hardware Co., 143 N. C., p. 54; *Kernodle v. Telegraph Co.,* 141 N. C., p. 436. But, considering the case in reference to both these positions, we are of opinion that defendant's position cannot be sustained. Speaking to this question of her ability to get to the funeral notwithstanding the negligent delay, plaintiff testified, in part, that she lived at Johnson Street in the city of Raleigh, one-half to three-fourths of a mile from the Union Station; that her husband was a barber whose shop was somewhere near; that she received the message shortly before noon, and at that time she had no money, and could not obtain any till she saw her husband; that he was not in his shop at the time, but was downtown somewhere, and she could not see him until he came home at the dinner hour, which was usually 12:30, and, further, that she had to make some purchases, a pair of shoes, before she could have gone; that she had no time to have taken this train at 12:50, even if she had known of it, and that she did not go on the 4 p. m. train, as that would have been too late. She further testified that she was unable to pay $10, the price then required for an automobile to Durham. On this statement and other relevant testimony, we think his Honor made correct decision in referring the question to the jury to determine whether plaintiff, under all the facts as they existed, could by reasonable effort by train or automobile have gotten to Durham in time to have attended the funeral. Certainly there was nothing in the ruling that gave defendant any just ground for complaint. *Smith v. Telegraph Co.,* 167 N. C., p. 248; *Bailey v. Telegraph Co.,* 150 N. C., p. 316. It was further urged for error that the court admitted testimony from the witness W. D. Pool to the effect that his wife, the deceased, wished the plaintiff to have their little boy in case she died. The entire statement on this point, questions and answers, are as follows:

Q. State whether or not you ever heard any expressions of affection between your wife and Mrs. Weeks? (Objection by defendant; objection overruled; defendant excepts. Exception No. 1.) A. Yes, they were—they thought lots of each other, and very often spoke of each other when they were away from each other. My wife wanted my sister to have my little boy if she died; if she died, if she was to die, she wanted my sister to have her little boy. (Objection by defendant to the foregoing answer; objection overruled; exception.)

The ruling of the court here might very well be upheld on the principle that when a part of the witness's answer is relevant and competent, a general objection thereto will not be sustained, though a part of the answer may be improper. *Ricks v. Woodard,* 159 N. C., p. 647; *Smathers v. Hotel Co.,* 167 N. C., p. 469; *S. v. Ledford,* 133 N. C., p. 714. But apart from this, where the state of feeling between two parties is a fact directly relevant to the issue, both the conduct of the parties

toward each other and their conversations and declarations of one about the other are usually admissible, "the limitation being that they should be at a time and under circumstances to exclude any reasonable suspicion of their sincerity." *Luckey v. Telegraph Co.*, 151 N. C., pp. 551-553; *S. v. Draughon*, 151 N. C., pp. 667-670. In the present case the evidence was ample to show that these two relatives lived on terms of intimacy and affection with each other. On the record, it could not be seriously controverted. In the answer of the husband, containing the alleged objectionable utterances, he says: "They thought lots of each other"; and even if the declarations of Mrs. Pool, the deceased, not in the presence of plaintiff, was inadmissible as direct evidence, it could well be received in corroboration, and very certainly should not be held for reversible error.

We find no error in the proceedings and, on the record, the judgment in plaintiff's favor must be affirmed.

No error.

RALEIGH SAVINGS BANK AND TRUST COMPANY v. M. T. LEACH AND W. H. PACE, TRUSTEE.

(Filed 27 October, 1915.)

1. Mortgages—Trusts and Trustees—Commissions—Agreements—Courts.

Where the deed in trust specifies the compensation to be paid the trustee as a certain per cent of the "proceeds" of the sale of lands made in executing the power thereof, and there is no allegation of fraud, undue influence or usury, the agreement of the parties will control, and the courts will not interfere, or reduce the amount of the trustee's compensation as specified in the deed; and by the word "proceeds," upon which the percentage as commissions is calculated, is meant the amount the lands sold for. *Loftis v. Duckworth*, 146 N. C., 344, cited and distinguished.

2. Mortgages—Trusts and Trustees—Sales—Advertisement — Costs —"Thirty Days"—Statutes.

Where a mortgage of lands provides that notice of the sale under the power thereof given in the conveyance shall be published in a newspaper, etc., "for a time not less than thirty days prior to the date of sale," and the language employed closely follows the provision of Revisal, section 641, it is *Held*, that by the agreement entered into by the parties the advertisement should be inserted in the newspaper once a week for four consecutive weeks, and not consecutively for thirty days, and an allowance made in the Superior Court for an advertisement for thirty consecutive days was erroneous.

3. Mortgages—Trusts and Trustees—Attorney's Fees.

Where a trustee has fully executed his trust except the payment of the proceeds of a sale of lands made in pursuance thereof to the parties entitled, and the funds are attached in his hands by a claimant thereof, he is not interested in the result of the action except to hold the trust funds until the matter is determined and to state the amount thereof; and there being no necessity for him to employ an attorney, no attorney's fees are allowable to him when he has employed one.

WALKER and BROWN, JJ., concurring in part.

BANKING CO. *v.* LEACH.

APPEAL by defendants from *Daniels, J.,* at the May Term, 1915, of WAKE.

Appeal from an order allowing W. H. Pace, trustee, as commissions the sum of $350, his attorney, John Boushall, $25, and cost of advertising, $69.30, and the controversy is wholly between the defendants Leach and Pace.

Prior to 3 May, 1915, the defendant M. T. Leach borrowed from the Raleigh Savings Bank and Trust Company the sum of $8,000, and to secure the payment of the same executed a deed of trust to the defendant W. H. Pace upon a storehouse and lot on the east side of Wilmington Street in the city of Raleigh. Default having been made in the payment of the said note and interest, the said Pace, who was the regular attorney of the Raleigh Savings Bank and Trust Company, being requested by the said trust company, advertised the said property for sale at the courthouse door in the county of Wake, and offered the same for sale on 3 May, 1915, when and where Miss Dixie Leach purchased the said property at and for the sum of $15,700.

The above entitled action was then brought on 7 May, 1915, by the plaintiff, and the lot conveyed to secure the debt and the surplus in hands of trustee were attached by the plaintiff.

The said trustee rendered bill as follows: Principal, $8,000; interest, $416; advertising, $69.30; auctioneer's fee, $2; trustee's commissions, $471, as of date 3 May, 1915; and the said Leach having filed objection to the allowance of commissions, $471, advertising, $69.30, and the said Pace having requested the court to allow an attorney's fee, his Honor, *Judge Daniels,* fixed it at $25. It appeared before his Honor that the said W. H. Pace, as trustee, prepared the advertisement, had it inserted in the *News and Observer,* had it posted at the courthouse door and three other public places; spoke to two or three persons to attend the sale, attended the sale on 3 May, 1915, which sale occupied one-half or three-quarters of an hour; prepared the deed to Mr. Vass, assignee of Miss Dixie Leach, and made demand upon the bidder, Miss Dixie Leach, for the payment of the purchase price. These were all of the services rendered by Mr. Pace as trustee, and in the above-entitled action he filed an answer by his attorney, John Boushall.

The deed of trust contains the following stipulations: If the said Leach shall fail or neglect to pay the interest on said note as the same shall hereafter become due, or both principal and interest at the maturity of said note, or any part of either the interest or principal when due and payable, or shall fail for six hours to keep the buildings on said property insured as below required, or shall fail for thirty days to pay any taxes or assessments on said property as below required, then, and in either of such events, the whole of said note shall be considered due and payable, regardless of the date of maturity expressed on the face

of said note, and it shall be lawful for the said Pace, trustee, his executors, administrators or assigns, to advertise the said hereby granted property for sale by notice published in some newspaper published in Raleigh, N. C., and by notice posted at the county courthouse door and three other public places in Wake County, N. C., for a time not less than thirty days prior to the date of sale, therein appointing a time and place of sale, and at such time and place to expose said land at public sale to the highest bidder for cash, and upon such sale to convey the same to the purchasers, and first retaining out of the proceeds of sale the costs of sale, including a commission of 3 per cent on the proceeds of sale, to pay to the holder of said note so much of the residue as may be necessary to pay off and discharge the same, and all interest then accrued and due thereon, together with such sums, with interest, as they may have paid out for taxes, assessment or insurance, as below allowed, and to pay the surplus, if any remain, to the said M. T. Leach, his executors, administrators or assigns.

It further appeared that the advertisement of the sale of the property appeared daily in the *News and Observer,* a newspaper published in the city of Raleigh, for thirty days.

Upon the foregoing evidence his Honor allowed W. H. Pace, as trustee, for his commissions, $350, allowed the *News and Observer* for advertisement, $69.30, and allowed John Boushall, as attorney of W. H. Pace, trustee, the sum of $25.

1. The defendant M. T. Leach excepted to the allowance of the sum of $350 to the trustee, upon the ground that the same was unreasonable for the service rendered by the trustee.

2. The defendant M. T. Leach excepted to his Honor's allowance of the advertisement in the *News and Observer,* as it was unnecessary to put said advertisement in said paper daily for thirty days prior to the day of sale, and that the amount of $3 was all that the court could allow for the advertisement.

3. The defendant M. T. Leach excepted to the allowance to the attorney of the trustee, $25—not upon the ground that the same was unreasonable, but that the fee of the attorney of the trustee could not be charged and retained by the trustee out of the proceeds of sale of the lot.

The defendant W. H. Pace, trustee, through his attorney, excepted to the allowance of only $350 to the trustee.

Both parties appealed.

No counsel for plaintiff.
Manning & Kitchin and W. L. Watson for defendant Leach.
John H. Boushall for defendant Pace.

ALLEN, J. 1. Did the court have the power to fix the compensation of the trustee for executing the power of sale, or is the compensation determined by the stipulation in the deed of trust?

It is clearly recognized in *Howell v. Pool,* 92 N. C., 453, that the court can determine what is a reasonable allowance for services rendered by a trustee, although the amount is specifically provided for in the deed of trust, when the court has taken jurisdiction of the cause and the parties, and the sale is made under its decree; but while there are expressions in *Clark v. Hoyt,* 43 N. C., 222, and *Duffy v. Smith,* 132 N. C., 38, indicating that this power does not exist, in the absence of evidence of fraud or undue influence, or that it is a cover for usury, when the sale is made under the power in the trust deed, we have not been able to find a case in our Reports directly deciding the question.

In *Boyd v. Hawkins,* 17 N. C., 329, which is relied on by the defendant Leach, it appeared that the relation of trustee and *cestui que trust* already existed under former conveyances, when the agreement for compensation to the trustee was inserted in a subsequent deed of trust, and the decision rests upon the ground that the trustor was in the power of the trustee.

The authorities elsewhere generally support the position that the parties have the right to stipulate in the deed of trust how much shall be paid for the services of the trustee, and that when there is no fraud nor undue influence, and the contract is not a cover for usury, and is not so large as to be oppressive, that the contract of the parties will be enforced and cannot be disturbed by the courts. "The mortgage or trust deed may provide for compensation to the mortgagee or trustee, and then the agreement of the parties will, of course, govern." Jones on Mortgages (6 Ed.), sec. 1923.

"If the instrument creating the trust fixes the compensation, or declares that none is to be received, or where the trustee, previous to his acceptance of the trust, makes a valid and binding agreement with the *cestui que trust* as to the compensation which he is to receive, the compensation fixed by the instrument, or by such agreement, will be the rule of allowance to the trustee, and cannot be reduced by the court." 39 Cyc., 494.

"The compensation of the trustee may be provided for in the trust instrument or by contract between the seller and the trustee. In that case, by the acceptance of the trust, the trustee will become bound to be satisfied by the amount there specified." 7 Mod. Am. Law, 332.

"The acts of Assembly which settle the allowance to be made to persons sustaining fiduciary relations, for their care and trouble in the administration of their trusts, do not supersede the right of parties who are thereto legally competent to make their own contracts in this particular. If they agree upon a different form or rate of compensation,

their agreement will constitute the law of the particular case, and as such be enforced." *College of Charleston v. Willingham,* 30 S. C. Eq., 195.

"Where the instrument creating the trust provides that the trustee shall have a compensation for his services in executing the trust, such provision will be enforced. If the instrument declares the rate of compensation it must be followed." *In re Schell,* 53 N. Y., 263, 265.

"Where the instrument creating the trust, however, fixes a different compensation, or declares that none is to be allowed, or where the trustee, previous to the acceptance of the trust, makes a valid and binding agreement with the *cestui que trust* as to the rate of compensation to be allowed for his services in the execution of the trust, that, of course, must prevail." *Meacham v. Sternes,* 9 Paige's Chancery Reports (N. Y.), 398, 404.

"We are of opinion . . . that the court had no more right to increase his compensation beyond that provided for by the trust, without the consent of the other parties in interest, than it would have had to decrease it without his consent." *Southern Ry. Co. v. Glenn,* 98 Va., 299, 313.

"It is next contended by appellants that the trustee was entitled to charge only reasonable compensation for the services performed by him as such trustee. Ordinarily, that is true, but that rule of law is inapplicable where the amount of the compensation to be paid had been fixed by contract." *Ladd v. Pigott,* 114 S. W. (Mo.), 985.

"Where the instrument creating the trust fixed the compensation of the trustee, it must prevail." *Biscoe v. State,* 23 Ark., 592, 598.

We therefore conclude, as there is no allegation of fraud, undue influence, oppression or usury, that his Honor was in error in reducing the amount provided for in the deed of trust as compensation for the trustee, and that he is entitled to 3 per cent upon the proceeds of the sale, according to the agreement of the parties, and proceeds of sale means what the land sold for.

In *Loftis v. Duckworth,* 146 N. C., 344, the commissions of the trustee were confined to the debts secured in the deed of trust, and not allowed on the amount for which the property sold, because this was the express provision of the deed of trust.

2. Is the defendant trustee entitled to charge, as a part of the expense of sale, $69.30 for advertising in the *News and Observer* for thirty consecutive days? We think not.

The parties to a trust deed have the right to make a special agreement as to how the property shall be advertised for sale, in addition to statutory requirements, and may provide for additional expenditures for that purpose, but the deed of trust in this case follows very closely the language of section 641 of the Revisal, which provides: "No real

property shall be sold under execution, deed in trust, mortgage, or other contract hereafter executed, until notice of said sale shall be posted at the courthouse door and three other public places in the county for thirty days immediately preceding such sale, and also published for four weeks in some newspaper published in the county, if a paper is published in the county: *Provided,* the cost of such newspaper publication shall not exceed $3, to be taxed as cost in the action, special proceeding or proceeding to sell."

The advertisement contemplated by this section in the newspaper is once a week for four weeks, and in the absence of an agreement to the contrary, only $3 can be allowed for this item of expense. The small amount allowed by the statute gives clear indication that it was not intended that the notice in the newspaper should be published for thirty consecutive days.

3. Is the trustee entitled to the allowance of $25 for an attorney's fee?

A trustee has the right to employ counsel to aid him in the execution of his trust, and a court of equity may make reasonable allowance for the services rendered, but he cannot employ counsel at the expense of the trust estate when it is not necessary. *Day v. Davis,* 107 N. C., 270; *Knights of Honor v. Selby,* 153 N. C., 208.

In the first of these cases, *Merrimon, C. J.,* speaking for the Court, says: "There is no statutory provision in this State, that has been brought to our attention, or within our knowledge, that prescribes or authorizes an allowance of compensation directly to the counsel of commissioners charged with a particular duty by an order of court, or otherwise, or to counsel of trustees, whatever may be the nature of the trusts wherewith they may be charged. Nor is there any general rule of practice prevailing in courts that permits such allowances to be made. In the absence of statutory provision, the courts, in the exercise of chancery powers, make allowances to commissioners and trustees in appropriate cases, and such allowances are sometimes enlarged so as to embrace reasonable compensation to counsel of such commissioners or trustees in cases where counsel is necessary to a proper discharge of their duties, but in such cases the courts are careful to see that the services were necessary, that the charges are reasonable and are charged against the proper parties."

Applying this principle, we do not think the attorney's fee ought to be charged against the defendant Leach. The trustee had already executed his trust, except he had not paid the surplus in his hands to the trustor, and he was made a party to this action only for the purpose of attaching the fund in his hands. He had nothing to do with the action except to state the amount in his hands, and is not interested in the result except to obtain his commissions.

This will be certified to the Superior Court with directions to enter judgment in accordance with this opinion. The costs of the appeal will be divided between the defendants.

Reversed.

WALKER, J. Concurring fully with the Court in the opinion that Mr. Pace, as trustee, is entitled to commissions on the entire proceeds of the sale, and not merely to the extent of the indebtedness, and at the rate fixed by the deed, I am unable to agree with my brethren that he is not entitled to even the *actual* cost and expense of advertising the sale, though paid by him, beyond the amount of $3, which is fixed by law for advertising sales. In my judgment, Revisal, sec. 641, as to the cost of advertising, applies only where the sale is made by the court, as will appear from the proviso, which is that "the cost of such newspaper publication shall not exceed $3, to be taxed as costs in the action, special proceeding or proceeding to sell." It plainly means that the court ordering the sale shall not allow more than that amount, and when you say, "shall be taxed as cost in the action," you refer necessarily to a judicial proceeding. Besides, this sale was required to be advertised, not for four weeks, but for thirty days, which is more than four weeks.

In the absence of fraud, undue influence or some other vitiating element, parties may freely contract with each other. If a debtor, when giving a mortgage with a power of sale, wishes to provide that notice of sale shall be advertised for a longer time than four weeks, or thirty days, or even sixty days, in order to secure the widest publicity of the sale, I can see no good reason why he should not be permitted to do so, if he is willing to pay for it; and not being against good morals or any established public policy, and the contract being free from fraud, undue influence or oppression, it would be an interference with the freedom of contract to forbid that he should do so. Whether the trustee has paid an unreasonable amount for the advertisement, or is about to pay it, raises a different question, and the reasonableness of the amount should be determined by the court below, which should find the facts, and decide thereon whether it is reasonable or not. If it is the usual amount charged, and prudent men paid for such service, and it was paid, in good faith, for the purposes of executing the trust, we do not see why he should not be entitled to an allowance of the full amount. How, otherwise, could he perform his duty as trustee, under the terms and directions of the deed? He must advertise in a newspaper, for the deed so requires, and he must pay what is usually charged or be refused the service. What is he to do? The trustor has directed him to do that particular thing, and promised to pay for it—not $3, but what it reasonably costs to have it done. He should not be ex-

pected to pay the difference out of his own pocket, when the service is not rendered to him individually, but as trustee, and he derives no personal benefit from it, but is acting solely for another who has requested him to do the act, or perform the service, and agreed to reimburse him for his outlay.

It was said in *McIver v. Smith,* 118 N. C., 73, in reference to advertisement by a mortgagee: "The mortgage fails to specify the manner of advertising, but simply states that after advertising, the mortgagee may sell on default. A mortgage is a contract, and the parties may affix such terms and conditions as they see fit, provided creditors or others interested at the time are not affected thereby." The original statute brought forward in Revisal, sec. 641, was passed to remedy a certain evil. Property was being advertised only at the courthouse, by posting there, and also at three or four public places elsewhere. This was found to be subject to abuse, to the prejudice of the mortgagor or trustor, and, therefore, a more effective method of giving notice was resorted to, so that there would be more bidders and greater competition, insuring a higher price. It was not intended to prevent the parties from so arranging by agreement among themselves that there should be a more extended advertisement so as still further to attract bidders and stimulate competition, for it was the object of the statute itself to do that very thing, though not so elaborately, on account of the expense, leaving to the parties to contract for additional time of advertisement, if so desired.

It is generally held elsewhere that a trustee is entitled to the commissions, and the costs and expenses of executing the trust, as stipulated in the instrument creating the trust. 27 Cyc., 1500, 1501. It is there stated that a trustee, "if it is so provided in the deed, or by contract of the parties, may retain out of the proceeds (of the sale) his fixed fee or commissions," and further, that this rule also extends, in its application, to "the cost of printing and publishing the notices or advertisements of the sale," which is "incurred in connection with the sale," and this is true, even though the sale proves ineffective, if the attempt to sell was made in good faith, and the abortiveness of it was not due to any fault of the trustee; and he is also entitled to any other proper and legitimate items of expense to be charged against the proceeds and taken out by him. 27 Cyc., 1502.

It was said by the present *Chief Justice* in *Turner v. Boger,* 126 N. C., at p. 302: "It is true that a stipulation for compensation for making the sale, in addition to actual expenses, if reasonable, would be sustained," unless a cloak for usury. There is no suggestion of it here. *Judge Daniels* has found that the cost of advertising was reasonable, and should be paid by the trustee. The deed of trust provides the same kind of notice to be published in the newspaper as at the courthouse,

that is, for thirty running or consecutive days. There is nothing in the wording of the deed to show that the parties intended it to be once a a week for four weeks. That would be substituting the language of the court for that of the parties. Besides, it may also be said, in proof of what they meant, that Mr. Pace, the trustee, advertised daily in the *News and Observer,* according to the requirement of the deed, as *he* understood. His construction of it, and especially his act in reference to the kind of advertisement, was fully approved and indorsed by Mr. Leach in his note to Mr. Pace, dated 6 May, 1915, referring specially to the advertisement, and directing him to retain said costs and expenses of sale, and his commissions, and to make deed to Miss Dixie Leach, the purchaser, as he had arranged for the surplus, and he further acquits Mr. Pace of all liability to him for so dealing with the proceeds. How can language be stronger to express the clear understanding of the parties, and where is there now any ground of complaint left to the trustor? He not only agreed to pay the amount, now disputed, but afterwards ratified what the trustee had done, with full knowledge of the facts.

The Court held, in *Rish v. Ivey,* 76 Ga., 735, that a requirement that advertisement be made in a newspaper for thirty days was not complied with by inserting it once a week for four weeks. This matter does not depend upon the law in regard to sales under executions, nor is there any analogy thereto, or any inference to be drawn therefrom, contrary in effect to the view herein taken, as the question depends for its solution entirely on the contract of the parties. 39 Cyc., 493, 494.

As to the attorney's fees, I will readily concede that if Mr. Pace was required only to pay the net balance in his hands to Miss Leach, he would not be entitled to any fee for his attorney, as that required no professional assistance, being merely an act to transfer expressly directed by the deed. But he was compelled to do more than the simple act of payment. An attachment was issued in this action and levied on the fund in his possession, as trustee, and a complaint filed alleging that the deed of trust was fraudulent and void as against the trustor's creditors, and praying that the surplus be applied to the payment of his debts and to the satisfaction of his wife's dower interest in the land. The trustee could not, under the circumstances, admit these allegations to be true by not denying them, for his failure to deny them would, under the statute, Revisal, sec. 503, be equivalent to an admission of them. If the plaintiff, before the sale, had attacked the trust, it would have been the duty of the trustee, as we have decided, in *Belcher v. Cobb, ante,* 689, to defend in behalf of the trustor, and if he had failed to do so, he would have been liable for his inaction or delinquency, and this must also be true as to the fund or any part thereof after a sale of the property, and still more true, as he has actual possession of the

fund, and the creditor seeks to divert it from the original purpose in a way contrary to the directions of the deed.

It is said in 39 Cyc., pp. 339, 340: "A rule which has been applied in a great variety of cases affecting the administration and execution of trusts, is that a trustee has a right, whenever necessary to the proper administration, preservation, and execution of the trust and the prosecution or defense of actions, to employ counsel and to be reimbursed from the trust estate for whatever sums he has paid for the services of such counsel. The rule is applicable, even though the *cestuis que trustent* employed counsel to represent the same interests, and although, to a certain extent, the private and personal interests of the trustee may also be involved in the litigation. Counsel fees are a charge on the trust fund, however, only when they are reasonably necessary and proper, and contribute to the due administration of the trust." They are, of course, not allowable for services made necessary solely by the fault or maladministration of the trustee. Many courts even hold that if the professional services are rendered by the trustee himself, being an attorney at law, he may be allowed for them, thereby repudiating the English rule. 39 Cyc., 484, 485.

Chancellor Kent, in answer to an inquiry from a member of this Court, many years ago, gave it as his opinion that the English rule of not compensating trustees had not met with favor in this country because of our law in regard to public trustees, such as guardians, executors, administrators and receivers, and that the English rule had been greatly relaxed, if not totally abolished, by decisions in this country, so that now the courts allow conventional trustees to contract for their own compensation, in the form of commissions, besides reimbursing their expenses, which include an attorney's fee, and, when the agreement is silent, they will fix the charge for their services at a reasonable amount. *Boyd v. Hawkins, supra.* Mr. Pace was not bound to rely on his own professional skill, but had the right to seek independent advice and the services of an attorney to file his answer and take care of his fiduciary interests. All this is well supported by authority. *Fox v. Fox,* 250 Ill., 384, 395; *Grimball v. Cruse,* 70 Ala., 534, 539; *Nesbitt v. Woodburn,* 190 Ill., 283, 298; *Manderson's Appeal,* 113 Pa. St., 631, 634; *Abend v. End. Fund. Com.,* 174 Ill., 96, 106; *Cochran v. Richmond R. R. Co.,* 91 Va., 339, 342.

In one of the cases it is said that perilous indeed would be the position of a trustee if the law required him to protect and guard the trust fund in litigation at his own expense, and by his unaided efforts, and further, that the trust may be lawfully called upon to bear the necessary expenses of its own preservation, and among these are reasonable counsel fees paid to an attorney for properly appearing in court and presenting the trustee's side of the questions of doubt or controversy,

they being a proper charge on the trust fund, which is benefited by such service. If he had let go the fund without a contest, the consequences to him, as well as to the trustor, might have been serious. He could, at his option, advise himself and otherwise perform an attorney's part in the case, but it has grown into an adage of long standing that a man who is his own attorney has not a very wise or discreet client, however expert and skillful he may be. In this case the services of an attorney were necessary, and the amount allowed to him seems to have been reasonable.

In regard to the controlling effect of the express stipulations in the deed of trust, as to compensation and other matters, and for the proposition that the "agreement constitutes the law of the particular case, and as such it will be enforced," many authorities here and elsewhere may be cited. Jones on Mortgages (6 Ed.), sec. 1923; *College of Charleston v. Willingham,* 30 S. C. Eq., 195; *In re Schell,* 53 N. Y., 263, 265; *Jackson v. Jackson's Exrs.,* 3 N. J. Eq., 96, 113; *Meacham v. Sternes,* 9 Paige's Chancery Reports (N. Y.), 398, 404; *Southern Ry. Co. v. Glenn,* 98 Va., 299, 313; *Ladd v. Pigott,* 114 S. W. (Mo.), 984; *Biscoe v. State,* 23 Ark., 592, 598. And especially as to the necessity of advertising strictly according to the requirements of the deed, the following cases apply: *Eubanks v. Becton,* 158 N. C., 230; *Ferebee v. Sawyer,* 167 N. C., 200; *Brett v. Davenport,* 151 N. C., 56. Defendant's counsel in his brief cites quite an array of cases in support of those propositions. We may add, that the judge held both the cost of advertising and the fee to be reasonable in amount, and considering what is necessary to insert in an advertisment, under this deed, including the recital of the power and the description of the land, it clearly appears that the ruling was right as to the cost of advertising. The fee is not only reasonable, but very moderate, for the service to be performed. The Court in *Harris v. Martin,* 9 Ala., 895, said that the inquiry is not what such services are usually rated at, but the compensation of the attorney is fixed by ascertaining what a prudent trustee would feel authorized to pay an attorney, taking in consideration all the circumstances of the case, though the usual rate charged is entitled to some weight in making the estimate of a reasonable reward for the professional service, and the same is true as to the cost of advertising. But, in any view of the question, the judge's ruling was correct. *Ky. Natl. Bank v. Stone,* 93 Ky., 623; *In re Edward Schell, Trustee,* 53 N. Y., 263; *Mitchell v. Holmes,* 1 Md. Ch., 287.

I agree, therefore, with *Judge Daniels,* that defendant W. H. Pace should be allowed the full amount paid for advertising the sale, and also the attorney's fee.

JUSTICE BROWN concurs in the dissenting opinion of JUSTICE WALKER.

E. D. NALL, ASSIGNEE OF E. D. NALL COMPANY, v. C. B. KELLY AND HIS GUARDIAN, ATTIE R. KELLY.

(Filed 27 October, 1915.)

1. Vendor and Purchaser—Goods Sold—Verified Account—Evidence—Interpretation of Statutes.

Revisal, section 1625, enacting that in actions for "goods sold and delivered, a verified itemized statement of such account shall be received in evidence, and shall be deemed *prima facie* evidence of its correctness," clearly imports by its express terms that it is confined to "goods sold and delivered"; and it was designed to facilitate the collection of such accounts where there was no *bona fide* dispute and to relieve the plaintiff in such instances of the expense and delay of formally taking depositions; and the terms of the statute are strictly construed.

2. Same—Witnesses.

An affiant who verifies an account of goods sold and delivered, which is to be received in evidence and taken as *prima facie* evidence of its correctness, under the provisions of the Revisal, section 1625, and cognate sections, shall be regarded and dealt with as a witness *pro tanto*, and to such extent must meet the requirements and is subject to the qualifications and restrictions as to other witnesses; and when it appears on the face of the account or affidavit that the affiant has no personal knowledge of the transaction, or has sworn to the matters stated in his affidavit on information and belief, he being incompetent to testify thereto as a witness, the affidavit does not come within the intent and meaning of the statute.

3. Same—Transactions with Deceased.

A verified itemized statement of an account made by the seller of goods, sought to be introduced and received as *prima facie* evidence of the sale and delivery thereof as therein stated, under the provisions of Revisal, section 1625, is construed to be in subordination to the provisions of the Revisal, section 1631, when it is shown that the purchaser, at the time of making the affidavit, was a lunatic, etc.; and should the affiant swear to the matters of account as within his own knowledge, his verification or affidavit, as stated, is ineffectual, being the testimony of a party interested in the transaction or communication sworn to. The principles held with reference to Revisal, sections 1622, 1623, commonly known as the Book Debt Law, discussed and distinguished.

4. Vendor and Purchaser—Verified Accounts—Trials—Evidence—Nonsuit.

Where a verified account or affidavit to a statement for goods sold and delivered is insufficient to establish a *prima facie* case, under the provisions of Revisal, section 1625, and this is the only evidence offered, a judgment of nonsuit upon the evidence is properly allowed.

APPEAL by defendant from *Devin, J.*, at the July Term, 1915, of LEE.

Civil action. The action was instituted by E. D. Nall, as owner and assignee of E. D. Nall Company, against C. B. Kelly, to recover an account for fertilizers and supplies sold to C. B. Kelly by the Nall Company, Incorporated, during the year 1912. It appearing that C. B. Kelly had been duly adjudged a lunatic, his guardian, Attie R. Kelly, was made party defendant.

There is also a count in the complaint, being section 3, alleging that said C. B. Kelly, now a lunatic, had agreed and promised to pay said account, the balance thereof amounting to $345.11, with interest from 1 November, 1912. Defendant answered, and in proper terms denied information or knowledge as to sales; denied the promise to pay as alleged in section 3, and denied the general allegation of indebtedness contained in section 4 of the complaint. On issues then joined, plaintiff, in support of his claim, offered in evidence a verified account, giving an itemized statement of all articles sold, with dates; also items of credit and dates, same being headed as follows:

SANFORD, N. C., 1 January, 1914.

Mr. C. B. Kelly, Broadway, N. C., in acct. with E. D. Nall Co., Inc.
Fertilizer for Lee County farm, by M. B. Hudson.

Then follows itemized account, as stated, giving amount and date of the articles, and also amount and date of credits, the account showing a balance due as of 1 November, 1912, of $345.11, and same being verified at bottom in terms as follows:

E. D. Nall, having been duly sworn, says that he was an officer of the E. D. Nall Company, a corporation under the laws of the State of North Carolina, during the years 1912-1913, towit, secretary and treasurer, and as such duly authorized to make this affidavit; that the attached itemized statement of account for goods, wares and merchandise sold and delivered to C. B. Kelly is true and correct; that said items of goods, wares and merchandise therein named were actually delivered to C. B. Kelly, and that there is due and unpaid thereon the sum of three hundred forty-five and 11-100 dollars, with interest thereon from 1 November, 1912, until paid; that there are no offsets or counterclaims to the same. E. D. NALL.

Suscribed and sworn to before me this July 26, 1915.
T. N. CAMPBELL, *C. S. C.*

Defendant objected to introduction of account; overruled, and defendant excepted. No further evidence being offered, there was motion of nonsuit; overruled, and defendant excepted. Verdict for plaintiff for balance due. Judgment on verdict, and defendant excepted and appealed.

Williams & Williams for plaintiff.
Hoyle & Hoyle for defendants.

HOKE, J., after stating the case: In Laws of 1897, ch. 480, it was enacted, "That in any action instituted in any courts of this State upon an account for goods sold and delivered, a verified itemized statement

of such account shall be received in evidence, and shall be deemed *prima facie* evidence of its correctness."

This law now appears in Revisal 1905, in the chapter on Evidence, section 1625, and is confined, as its terms clearly import, to actions on account for goods sold and delivered. *Hospital Association v. Hobbs,* 153 N. C., p. 188, and was clearly designed to facilitate this collection of claims about which there was no *bona fide* dispute, and to relieve the plaintiff in cases of that character of the expense and delay of formally taking depositions.

Statutes of this character, here and elsewhere, for obvious reasons, have very generally received a strict construction by the courts. *Knight v. Taylor,* 131 N. C., p. 84; *Mernam Co. v. Thomas Co.,* 103 Va., p. 24; *Foster and Webb v. Scott Co.,* 107 Tenn., 693.

And in this jurisdiction it has been very generally considered that an affiant who verifies an account, under this and cognate statutes, shall be regarded and dealt with as a witness *pro tanto,* and to such extent must meet the requirements and is subject to the qualifications and restrictions of other witnesses. *Atkinson v. Simmons,* 33 N. C., p. 416; *Kitchin v. Tyson,* 7 N. C., p. 314.

It will be noted that this section we are discussing contains no provision as to who shall make the affidavit, and the contents of a proper affidavit being given the force and effect of evidence, and the affiant being regarded, as we have seen, as a witness *pro tanto,* we are of opinion that the verification should be by some one competent to testify, if he were present, and when it appears on the face of the account and verification that the affiant has no personal knowledge of the transactions covered by the account, or that affiant, on the record, is otherwise incompetent to testify, in such case the account and affidavit offered does not come within the statutory provision, and the same, in this form, should not be received.

In the case before us, an examination of the account accompanying affidavit will show that the goods were bought, if at all, from E. D. Nall Company, a corporation, and that the company has assigned all of its choses in action, accounts, etc., to plaintiff.

So far as appears plaintiff, himself, does not seem to have had any personal knowledge of the transactions, but on the face of the account the goods purport to have been sold by M. B. Hudson.

The verification, therefore, appears to have been made on information from others, and if this be the true interpretation of this account, the plaintiff would not be able to testify to it as a witness, and should not be allowed to verify under the statute. *Kennedy v. Price,* 138 N. C., p. 173.

And if it were otherwise, if the verification should be held to proceed on personal knowledge of the affiant, in such case he becomes an

incompetent witness under section 1631 of the Revisal, prohibiting a party interested from testifying as to personal transactions or communications with an adversary who is, at the time the evidence is offered, deceased or a lunatic. This section, 1631, enacted as necessary to protect the estate of deceased persons and lunatics from unconscionable claims, and based upon the gravest reasons of public policy, approved by repeated decisions of this Court, and found eminently desirable in practice, should not be set aside or impaired unless the purpose of the Legislature to do so is very clearly expressed, and we think this section, 1625, appearing as a section on the law of evidence, should be construed in subordination to section 1631, under the principle decided in *Cecil v. High Point,* 165 N. C., p. 431, and other similar decisions, and in cases presenting the question, however meritorious a particular demand may be, when it involves a personal transaction between a claimant and the estate of a lunatic or deceased person, it must be established by proper testimony, and under the statute as now drawn an *ex parte* affidavit of the living claimant should not be heard. 1 Corpus Juris., p. 665, citing *Swertt v. Wherry,* 4 Tex. Civ. App., 15 S. W., 121.

In making this decision, we are not inadvertent to cases in this State holding that sections 1622 and 1623 of Revisal are not subject to the provisions of section 1631 of the same chapter, VII of Revisal. See *Leggett v. Glover,* 71 N. C., p. 211.

At the time our laws were enacted permitting parties to testify, and this section, 1631, was passed as necessary to the safe enforcement of such a policy, these sections, 1622 and 1623, commonly known as the Book Debt Law, had long been the law of the State, being very carefully drawn as to form and substance, and applying only to small sums, not greater than $60, they were supposed to have served a useful purpose, and it was held, in several cases, that they would still be recognized in the very restricted instances to which they could apply. But while we have no disposition to disturb these cases, as correctly construing the sections referred to, we must decline to extend the principle further, and are of opinion, as stated, that under the terms of section 1625, as now drawn, an affiant, verifying an account so as to make the same *prima facie* evidence, must be a competent witness to the facts, and when it appears on the face of the account that he has not personal knowledge of these facts, or it is established that he is otherwise an incompetent witness, the *ex parte* account so verified should not be received in evidence, and when, as in this case, it is the only evidence offered, a nonsuit should be allowed. There is error in refusing the defendant's motion to nonsuit, and the same is

Reversed.

KINSTON COTTON MILL v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 27 October, 1915.)

1. Appeal and Error—Objections and Exceptions—Statements by Court.

Objection, taken only in the assignments of error in the case on appeal, that the trial judge misstated the evidence to the appellant's prejudice, will not be considered on appeal, it being required that the attention of the trial judge be called thereto and exception taken, at the time or after the charge has been delivered, so as to afford him an opportunity to make the correction, if he has made the mistake.

2. Carriers of Goods—Delivery—Principal and Agent—Trials—Evidence—Expression of Opinion—Statutes.

In an action by the consignee against the carrier of goods to recover damages for the failure of the latter to deliver the shipment, where there is evidence tending to show that a certain drayman customarily received the goods for the plaintiff, to whom delivery had been made, without giving a receipt therefor by the defendant, a charge by the court to the jury is held correct, that if they found that the drayman was the authorized agent of the plaintiff, a delivery to him would be a delivery to the plaintiff; and an expression by the judge that a delivery by the defendant without taking a receipt was a careless act, is not held, under the circumstances, as an expression of opinion by the court, prohibited by the statute, or was intended, or understood by the jury, in the sense of a reflection upon the moral character or integrity of the agent, defendant's witness, who had testified to the fact.

APPEAL by defendant from *Peebles, J.*, at the March Term, 1915, of LENOIR.

Civil action tried upon these issues:

1. Were the two cases of yarn the property of the plaintiff? Answer: "Yes."

2. Did the defendant negligently fail to deliver the two cases of yarn to Suffolk Knitting Mills? Answer: "Yes."

3. What sum, if any, is the plaintiff entitled to recover of the defendant? Answer: "One hundred and sixteen and 44-100 dollars ($116.44), without interest."

G. V. Cowper, R. H. Lewis for the plaintiff.
Rouse & Land for the defendant.

BROWN, J. There are only two assignments of error, both relating to the charge of the court.

The first relates to the charge bearing upon the evidence of one Churn, the agent for the defendant. It is contended that the court misstated the testimony of Churn in reciting it to the jury. It is contended that Churn stated positively that the thirteen cases of goods had been delivered, and that the court, in referring to the evidence,

stated that the witness Churn testified that two of the cases had not been received. It was the duty of the defendant, at the time, to have called the attention of the court, at the conclusion of the charge, to the misstatement of the testimony, in case any had been inadvertently made, in order that an opportunity might be then and there given to correct it. It appears from the record that no exception was taken at the time, and that his Honor's attention was not called to it and that the objection first appears in the assignments of error.

The only other assignment of error is as follows:

"That the court erred in charging the jury: 'Now, if you are satisfied that John Marshall was the authorized drayman to receive freight from the railroad company, and you are further satisfied that it was delivered to John Marshall, as testified to by one of the witnesses, then you should answer that second issue "No," because that would be a delivery to the knitting mills. It was not necessary that they should have a receipt for it.

"'If they had a man there authorized to go after their goods; and he went there, and the railroad company had been in the habit of delivering goods to him without an order, it was very careless on the part of the railroad agent there to do it; still it was not necessary to take a receipt for it; and if you find that John Marshall was the authorized drayman, and he went there and got that yarn from the railroad company, why, then, the court charges you that that would be a delivery to the knitting mills. We all take notice that railroads do not send around packages to the consignees like express companies do. We have to send for them.'"

It is contended that in this part of the charge the court instructed the jury that if Marshall was the authorized agent of the consignee, and the railroad company had been in the habit of delivering goods to him without an order, it would be a delivery to the consignee. The defendant insists that the court thereby required the jury to find that Marshall was the agent of the consignee, and also that the agent had been in the habit of delivering goods to him for the consignee. We do not think the assignment can be sustained.

The court instructed the jury repeatedly that if they should find that Marshall was the authorized drayman, and he received the goods from the defendant, it was a legal delivery to the plaintiff. His Honor might well have instructed the jury that all the evidence proved, and that the plaintiff admitted that Marshall was the regular drayman for the plaintiff, and that it was admitted that if the goods were delivered to Marshall, the defendant would not be liable. The whole case seems to turn upon the fact as to whether the goods were delivered to the drayman or not.

To put the matter beyond controversy, after the jurors had started to retire, the court recalled them and further charged them as follows: "If you should find that John Marshall was their authorized drayman, and that he got their property, and it was delivered to him, that was a delivery to the company."

It is further contended that the words embodied in the said charge were practically an expression of opinion upon the facts by the judge. It is true his Honor said it was a very careless act on the part of the railroad agent to deliver goods without taking a receipt for them, but we do not think this amounts to an expression of opinion upon the facts at issue, nor do we think that it was intended by the judge or understood by the jury to be in any sense a reflection upon the moral character and integrity of the witness Churn.

The observation of his Honor that it was a careless act has some foundation in the admissions of the witness Churn, himself, who admitted "that it is against the rules of the defendant company to deliver any freight unless there is a signature of the person to whom it is delivered." But the witness seeks to justify his acts by saying, "But lots of them do it. They were doing that before I went there."

While the words of his Honor objected to seem to have been unnecessary, and might well have been omitted, we are satisfied that they had no appreciable effect upon the jury, so far as to influence their verdict.

No error.

NANCY E. CULBRETH, ADMINISTRATRIX, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 27 October, 1915.)

1. Carriers of Goods—Bills of Lading—Reasonable Stipulations—Contracts.

A bill of lading issued by a railroad company for the transportation and delivery of freight, when accepted by the shipper and consignee, becomes a valid and binding contract between them as to all reasonable stipulations thereon.

2. Same—Claims for Damages—Conditions Precedent—Limitation of Actions—Contracts Against Negligence—Public Policy.

A stipulation on a freight bill of lading that "Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or in case of failure to make delivery of the property, then within four months after a reasonable time for delivery has elapsed," or the carrier shall not be liable, is a reasonable and valid stipulation, requiring the performance of the condition as giving an opportunity to avoid unconscionable claims, and is not regarded as a stipulation limiting the liability of the company for damages arising from its own negligence.

3. Carriers of Goods—Bills of Lading—Reasonable Stipulations—Trials—Evidence—Burden of Proof.

Where the plaintiff seeks to recover damages to a shipment of goods under a bill of lading requiring notice of claim in writing to be given within a certain time, and the stipulation is reasonable and valid, the burden is on the plaintiff to show a compliance therewith.

4. Same—Nonsuit.

Where the plaintiff, in her action to recover damages to a shipment of goods, has failed to show by her evidence a compliance with a valid stipulation in the bill of lading, requiring notice to the defendant of her claim before such loss may be recovered, and a judgment of nonsuit is entered, she may, in another action therefor, show, if she can, the required notice had been given by her.

APPEAL by defendant from *Whedbee, J.*, at the February Term, 1915, of COLUMBUS.

Civil action. Plaintiff sued for damages resulting from injuries to household furniture which she had shipped via the Southern Railway Company and the defendant Atlantic Coast Line Railroad Company, from Raleigh, N. C., by way of Selma, N. C., to Wilmington, N. C., under a bill of lading issued to and accepted by plaintiff, which contained this stipulation: "Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable." There was evidence of damage to the furniture when delivered by the defendant at Wilmington. There was an exception to the charge, but it need not be considered, in the view taken of the case by the Court.

Defendant moved to nonsuit the plaintiff, and to dismiss the action, under the statute, at the close of the plaintiff's testimony, and also at the close of all the testimony. The motions were denied and an exception duly entered. There was a verdict for the plaintiff, under the charge of the court, for damage to the goods, and judgment was rendered thereon. Defendant reserved all exceptions, assigned errors, and, among them, the refusal to nonsuit, and appealed.

L. V. Grady for plaintiff.

Davis & Davis and Schulken, Toon & Schulken for defendant.

WALKER, J., after stating the case: It has been well settled by our decisions, and it would seem to be an elementary rule of the law, that a bill of lading issued by the carrier of goods and accepted by the shipper and consignee constitutes a contract between them, and that each of them is governed by its terms, and their respective rights and liabilities are regulated thereby. 6 Cyc., 417; *Post v. R. R.*, 138 Ga.,

763. It is usual to insert in bills of lading or other contracts for shipment a provision that written notice of a claim for loss or damage to the goods shall be given to the carrier in a designated manner and within a specified time, such as two, three, or four months, and that, unless the notice is given, there will be no liability on the part of the carrier, and such stipulations have been upheld as valid and binding, so far as they are found to be reasonable. *Austin v. Railroad Co.,* 151 N. C., 137; *Deans v. Railroad Co.,* 152 N. C., 171; *Cigar Co. v. Express Co.,* 120 N. C., 348, where *Justice Clark* says that such a stipulation for 60 days notice would be reasonable and valid, following the decision in *Sherrill v. Telegraph Co.,* 109 N. C., 527, where a similar notice, as to claim for damages, to be given 60 days after it accrues, was required, was held to be good. See, also, *Selby v. Railroad Co.,* 113 N. C., 588; *Express Co. v. Caldwell,* 21 Wallace, 264; 4 Elliott on Railroads (2 Ed.), sec. 1512; *The Westminster,* 127 Fed., 680; *Express Co. v. Glenn,* 16 Lea, 472; *Express Co. v. Harris,* 51 Indiana, 127; *Lewis v. Railroad,* 5 Hurl. and N., 867.

It is plain that the stipulation is, in no sense, an exemption from liability for negligence, directly or indirectly, but a reasonable provision that the company be apprised of the claim in seasonable time, so that it may investigate the case and avoid the payment of false and fictitious demands, and this was held in *Selby v. Railroad Co., supra,* and *Sherrill v. Telegraph Co., supra; L. C. Co. v. Railway Co.,* 107 Va., 323; *Atlantic Coast Line Railroad Co. v. Bryan,* 109 *ibid.,* 523; *Va.-Caro. Chem. Co. v. So. Express Co.,* 110 *ibid.,* 666, where full discussion of the subject will be found. The Court closed its opinion in *So. Express Co. v. Caldwell,* 21 Wallace, at p. 272, with these words: "Our conclusion, then, founded upon the analogous decisions of the courts, as well as upon sound reason, is that the express agreement between the parties was a reasonable one, and hence that it was not against the policy of the law. It purported to relieve the defendants from no part of the obligations of a common carrier. They were bound to the same diligence, fidelity and care as they would have been required to exercise if no such agreement had been made. All that the stipulation required was that the shipper, in case the package was lost or damaged, should assert his claim in season to enable the defendants to ascertain the facts; in other words, that he should assert it within ninety days." The two propositions decided in that much-cited case are:

1. The responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy.

2. An agreement that, in case of failure by the carrier to deliver

goods, he shall not be liable, unless a claim shall be made by the bailor or by the consignee within a specified period, if that period be a reasonable one, is not against the policy of the law, and is valid.

Having settled this preliminary question in favor of defendant, we now come to the next and important one, whether the plaintiff has complied with the provision and thereby fixed the defendant with liability. We think she has not. In an action on contract, if the plaintiff's right depends upon the performance of a condition or stipulation of the agreement, he should allege and prove the performance of it or a legally sufficient excuse for its nonperformance, or fail in his suit. 9 Cyc., pp. 699 and 721. And it has been said that in case of noncompliance with his part of the obligation, he may not recover even upon a *quantum meruit*. *Ibid.*, 722; *Escott v. White*, 10 Bush. (Ky.), 169. But, however the law may be with regard to the pleadings, it is very certain that plaintiff must have shown performance on her part of this stipulation as a condition to her right of recovery. To this point the authorities are numerous. *U. S. Express Co. v. Harris*, 51 Ind., 127; *Bogardus v. Insurance Co.*, 101 N. Y., 328; *So. Express Co. v. Caldwell*, 21 Wall., 264; *Kalina v. U. P. Railroad Co.*, 69 Kansas, 172; *Osterhoudt v. So. Pac. Co.*, 62 N. Y. Suppl., 134; *C. and A. Railroad Co. v. Simms*, 18 Ill. App., 68; *N. P. Express Co. v. Martin*, 26 Canada Sup. Ct., 135; 4 Elliott on Railroads (2 Ed.), sec. 1512; *The Westminster*, 127 Fed., 680. In *Kalina v. U. P. Railroad Co., supra*, the Court held:

1. Where the shipping contract contains a lawful provision requiring the shipper to do something as a condition precedent to recovery, the burden of showing the performance of such condition rests upon the shipper, and if he fail to show performance he cannot recover.

2. This rule applies not only to a case where it is made to appear during the progress of the trial that plaintiff is seeking to recover upon a shipping contract containing such condition, but also to one where it has been counted upon in his petition, or set out as defensive matter by the carrier.

It was held in *Osterhoudt v. So. Pac. Co., supra*, that the burden of showing compliance with a shipping contract requiring the presentation of claims for damage to the carrier, within a given time, is on the shipper who seeks to recover for a loss of or injury to goods, even though he alleged a contract of shipment in general terms and the contract, as here, merely appeared in the evidence. *N. P. Express Co. v. Martin, supra*, held that the shipper or consignee, as the case may be, "must comply strictly with these terms (notice of loss), as a condition precedent to recovery against the carrier for failure to deliver, or for damage to the parcel, intended for the consignee," and must also allege and prove performance of the stipulation. That case is very much in point here, as is also *C. and A. Railroad Co. v. Simms, supra*.

The stipulation, therefore, is not merely a conventional limitation of the shipper's right to sue the carrier, as he is left at liberty to sue at any time within the period fixed by the statute of limitations, but it is an essential condition of the contract by which he is required to make his claim within the prescribed time, or in season for the carrier to ascertain the facts for his safety against spurious claims, and having presented his claim, as required by the contract, the shipper may delay suit. He must, though, show performance of the provision in order to recover. Has the plaintiff done this? Her own evidence showed conclusively that she had not. She stated that "as a matter of fact, she could not say that there was any claim filed with the company." If she trusted the matter to Mr. Head, who was not connected with the defendant, as its agent, or otherwise, so far as appears, she should have proved that the claim was filed by him, as required by the contract; but *that* she did not do. There is not any evidence of a claim being filed, showing its nature and the amount, or of anything that approximates it, and not even ground for a fair conjecture that it was filed.

But the plaintiff may hereafter show, if she can, that such a claim was filed, as a nonsuit does not prevent the bringing of another action or bar the same, as we held in *Tussey v. Owen,* 147 N. C., 335, following prior decisions of this Court, which are cited therein. We may add the following more recent cases: *Eureka L. Co. v. Harrison,* 148 N. C., 333; *Smith v. Manufacturing Co.,* 151 N. C., 260; *Tuttle v. Warren,* 153 N. C., 459. Unless the plaintiff can supply the deficiency in the present testimony, another suit will not avail her.

In the absence of the essential proof in this case, the motion to nonsuit must be sustained, which reverses the judgment.

Reversed.

TAYLOR AND THOMAS v. MUNGER AND BENNETT.

(Filed 27 October, 1915.)

1. Deeds and Conveyances—Timber—Extension Periods—Notice—Time and Place of Payment—Tender of Payment.

No notice is required to be given by the grantees of standing timber to cut the timber from the lands during the extension period allowed in the conveyance, when by the terms thereof no previous notice is required, but that the grantees shall have the privilege of cutting and carrying off the said timber within ten years, with an additional term of five years, if they shall pay annually during the additional term, at the grantee's office in N., on the first Monday in February of each year, a sum equal to 8 per cent of the original purchase price; nor will the grantee's right to the extension period be forfeited when it is shown that they have been able, ready and willing to pay the interest at all times when called upon, and that the grantor has not done so, though the grantees have continuously maintained their office at the place designated in the deed.

2. Contracts—Payment—Time and Place—Requirement of Obligee.

Where an instrument fixes a time and place for the payment of money, the person to whom it is to be made should accordingly be present in person or by agent to receive it.

APPEAL by plaintiff from *Connor, J.*, at the July Term, 1915, of ONSLOW.

Civil action, heard upon an agreed statement of facts. The court rendered judgment for the defendants, and the plaintiffs appealed.

Duffy & Day for the plaintiffs.
Frank Thompson, T. D. Warren for the defendants.

BROWN, J. It appears that the plaintiffs conveyed certain timber to the defendants, by deed dated 14 January, 1905, with the privilege of cutting and carrying off the said timber within ten years. The said deed contained the following extension clause:

"That the said party of the second part, their successors or assigns, shall have an additional term of five (5) years next ensuing the ending of the first term of ten (10) years in which to cut and carry away said timber from said land: *Provided, however,* that the said parties of the second part, or their successors or assigns, shall pay annually during the additional term of five (5) years, or until said timber shall be cut and carried away, to the parties of the first part or their legal representatives at the office of said party of the second part, at their office in New Bern, N. C., on the first Monday in February of each year, a sum equal to 8 per cent of the original purchase price of said timber."

We are of opinion, under the above extension clause, that no notice upon the part of the grantees to the grantors was necessary in order to avail themselves of it. The deed does not require any notice, and the extension, itself, is a part of the contract, and is, in effect, automatic. It is as much a part of the contract as the original ten years. At the expiration of the ten years, by the very terms of the deed, the grantees have the right to cut and remove the timber within the succeeding five years, provided they pay a sum equal to 8 per cent per annum of the original purchase price of the timber.

This case differs from *Powers v. Lumber Co.*, 154 N. C., 405, in that there is no condition in the deed that this 8 per cent shall be paid in advance; on the contrary, the deed expressly provides that the money is to be paid to the plaintiffs, or their legal representatives, at the office of the defendants in New Bern, N. C., on the first Monday in February of each year. The facts agreed show that the defendants have an office at their sawmill, about one mile from the city of New Bern; that the post-office address of the defendant was New Bern, and that the general superintendent of the defendant resided in New Bern, and transacted the business of the company at his residence in said city.

The facts agreed further show that G. G. Bennett, an officer of the defendant company, resides in New Bern, and resided there for the past two years, and at his house does transact the business of the company.

It is further admitted that neither of the grantors in said deed, nor any one representing them, have applied to the defendant company at New Bern, or at its mill office on 1 February, 1915, or at any other time, to receive the said money provided for in the said timber deed, and they have never made any demand on the defendant, either by letter or personally, for the payment of the said money.

It is admitted that the defendant, on the first Monday of February, 1915, and at all times since, has been ready, able and willing to pay the said money to the plaintiffs upon demand, and had expected the plaintiff to call for the same. It is found as a fact that the defendant's officers were present at their mill office and at their place of business in New Bern, N. C., on 1 February, 1915, ready, able and willing to pay the said money. It is well settled that where a place of payment is fixed, the person to whom the payment is to be made should be present by person or agent to receive the money. 3 Elliott on Contracts, 117; 38 Cyc., 150.

We think his Honor correct in his conclusions, and his judgment is

Affirmed.

ELIZABETH GLENN v. JOHN S. GLENN.

(Filed 27 October, 1915.)

1. Equity—Parol Trusts—Quantum of Proof—Instructions—Trials.

In an action to recover lands, where the defendant holds under a deed formally conveying to him the legal title, and the plaintiff is seeking to correct a mistake in the instrument or annex a condition to it, he is required to make out his claim by clear, strong and convincing proof, the question being one for the jury, with proper instructions from the court.

2. Same—Appeal and Error—Reversible Error.

Where the plaintiffs, the heirs at law of the deceased wife, are seeking to engraft a trust upon the title to lands conveyed to the husband, their stepfather, upon allegation and evidence tending to show that the lands were bought with the money of the wife and that the deed should have been made to her, it is reversible error to defendant's prejudice for the judge to charge the jury that the plaintiffs must establish their claim by the greater weight of the evidence, it being required that they do so by clear, strong and convincing proof.

APPEAL by defendant from *Daniels, J.*, at the June Term, 1915, of WAKE.

Civil action to have defendant declared a trustee for certain real estate purchased by him at foreclosure sale by Emily McVea, mortgagee; de-

fendant, at such sale, having bought and taken a deed for the property from the mortgagee.

Verdict and judgment for plaintiffs, and defendant excepted and appealed.

John W. Hinsdale for plaintiff.
W. H. Lyon, Jr., for defendant.

HOKE, J. The action was instituted by Mrs. Elizabeth Glenn against her husband, John S. Glenn, defendant, and the original plaintiff having died pending suit, her heirs at law, children by a former husband, were made parties plaintiff and, by leave of court, filed an amended complaint, basing their right to relief on allegations that defendant, their stepfather, had bought and taken a deed for the property at foreclosure sale under an agreement that he was to buy said property for his wife, and, second, that he had bought and paid for the property at such sale with the money of his said wife.

Defendant having, in his answer, denied these allegations, the cause was submitted on the following issues:

1. Did the defendant enter into an agreement with his wife, Elizabeth Glenn, whereby he bound himself to bid in for her the lot of land mortgaged to Mrs. McVea and sold under power of sale in said mortgage, and to take title thereto to the said Elizabeth Glenn? Answer: "Yes."

2. Was the land conveyed by Mrs. McVea, mortgagee, to defendant, paid for by the defendant with money belonging to Elizabeth Glenn? Answer: "Yes."

On evidence in support of the allegations and denial, the court charged the jury that the burden of the issues was on the plaintiffs and they were required to establish them by the greater weight of the evidence, and not by clear, strong and convincing proof.

It is the established position in this State that where a defendant holds under a deed formally conveying to him the legal title to real property, and a claimant is seeking to correct a mistake in the instrument or annex a condition to it or engraft a trust upon it, he is required to make out his claim by clear, strong and convincing proof (*Cedar Works v. Lumber Co.*, 168 N. C., p. 391; *Ely v. Early*, 94 N. C., p. 1), a position held to prevail in case of formal, written instruments, conveying personalty (*White v. Carroll*, 147 N. C., p. 334), and to written official certificates of officers given and made in the course of duty. *Lumber Co. v. Leonard*, 145 N. C., p. 339. And, in further application of the principle, it has been also held that, "When the testimony is sufficient to carry the case to the jury, as on an ordinary issue, the judge can only lay this down as a proper rule to guide the jury in their deliberations, and it is for them to determine whether, in a given case, the testimony meets the

requirements of this rule as to the degree of proof. *Gray v. Jenkins,* 151 N. C., pp. 80 and 82, citing *Cuthbertson v. Morgan,* 149 N. C., p. 72, and *Lehew v. Hewett,* 138 N. C., p. 6. It is also fully recognized here that this rule as to the quantum of proof does not obtain in suits to set aside deeds or other written instruments conveying property for lack of mental capacity, or for fraud or undue influence, or because made with intent to defraud creditors, etc.; plaintiff, in such cases, being required to establish his allegations by the greater weight of the testimony.

The distinction is very fully and satisfactorily discussed by *Associate Justice Avery,* in *Harding v. Long,* 103 N. C., p. 1, a case that has been repeatedly cited in approval of the principle. *Hodges v. Wilson,* 165 N. C., pp. 323-333; *Lamm v. Lamm,* 163 N. C., p. 71; *Culbreth v. Hall,* 159 N. C., pp. 588-591; *Odom v. Clark,* 146 N. C., pp. 544-549, etc.

From the facts in evidence as they now appear, the defendant has the legal title to the property in controversy, formally conveyed to him by written deed, pursuant to foreclosure sale, and the purpose of the action is to engraft a trust upon this title in favor of plaintiffs, children and heirs at law of Mrs. Glenn, deceased. The case, in our opinion, comes under the principle sustained in *Ely v. Early, supra,* and that line of cases, and plaintiffs are required to establish their allegations by clear, strong and convincing proof.

For the error indicated, there must be a new trial of the cause, and it is so ordered.

New trial.

W. W. KEMP v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 27 October, 1915.)

1. Railroads—Negligence—Fires—Presumptions—Evidence—Trials—Nonsuit.

The application of the doctrine that where a railroad company has set out fire, causing damage to another, there is a presumption of negligence on its part, requires that there should be evidence that the railroad company set out the fire; and where the evidence tends only to show that the defendant's depot caught fire during the night, which was communicated to the plaintiff's building and destroyed it, a judgment as of nonsuit upon the evidence is properly allowed.

2. Railroads—Negligence—Evidence—Cordwood—Fires.

Cordwood is a recognized and necessary commodity, with no extra hazards in its transportation or shipment; and a railroad being compelled to receive it when tendered for shipment, under a statutory penalty (Revisal, section 2631), and as it is impracticable to store it in a warehouse, it affords no evidence of negligence in communicating fire to plaintiff's building, when properly piled on the right of way, awaiting cars for shipment, in the absence of evidence that the place at which it was piled was an improper one, and it is not shown that the defendant had originally set out the fire or was responsible for it.

APPEAL by plaintiff from *Daniels, J.*, at the June Term, 1915, of WAKE.

Action to recover damages for negligently burning two buildings, the property of the plaintiff, situate on land adjoining the defendant's right of way.

The plaintiff admitted that he could not prove that the fire was set out by the defendant or that it originated from sparks emitted by the defendant's engine. The evidence tended to prove that the depot of the defendant caught fire after midnight, and it was not shown whether the fire originated in the depot building or on the top of it; that the burning of the depot building set fire to a box car on a side-track and the fire was then communicated to three or four carloads of dry pine wood placed on the railroad yard for shipment in which there was mixed a little dry oak, and that the fire was thence communicated to the buildings of the plaintiff; that the wood had been delivered to the defendant for shipment and had not been shipped because of a car shortage, and that the agent had been using his best efforts to secure cars; that the usual place for delivering wood was further from the plaintiff's houses, but that the wood was not placed there because that place was filled with other freight; that the wood had remained on the right of way for about five weeks.

At the conclusion of the evidence his Honor entered judgment of nonsuit upon the motion of the defendant, and the plaintiff excepted and appealed.

Robert C. Strong for plaintiff.
R. N. Simms for defendant.

ALLEN, J. The authorities, beginning with *Ellis v. R. R.*, 24 N. C., 138, and running through a long line of cases which are cited in *Currie v. R. R.*, 156 N. C., 422; *Kornegay v. R. R.*, 154 N. C., 389, and *Hardy v. Lumber Co.*, 160 N. C., 116, fully establish the proposition that where it is shown that the railroad company has set out fire which causes damage to another, that there arises a presumption of negligence, nothing else appearing. This principle has, however, no application here, because there is no evidence that the defendant set out the fire which was finally communicated to the property of the plaintiff.

It was admitted by the plaintiff upon the trial in the Superior Court that he could not prove the origin of the fire, and there is no evidence in the record that any engine of the defendant ever passed the point where the fire originated, unless it may be inferred from the circumstances that the defendant was maintaining a depot building and a railroad track. The plaintiff must, therefore, recover, if at all, upon the theory that although the fire was accidental, it was negligence on the part of

the defendant to permit cordwood to remain on its right of way, and that the communication of the fire from the wood to his property was the cause of his damage. The wood was ordinary seasoned pine and was piled in the usual way. It had been delivered for shipment and was left on the right of way until cars could be procured. The defendant was compelled to receive the wood when tendered, under a penalty for refusing to do so (Rev., sec. 2631; *Currie v. R. R.*, 135 N. C., 535), and as it was impracticable to store it in its warehouse, it could only place it on its right of way. If it had gone out of the right of way without permission it would have been a trespasser.

We have, then, a case in which there is no evidence that the defendant set out the fire, and the only negligence relied on is permitting wood to remain on the right of way, and as wood is a recognized and necessary commodity, with no extra hazards in its transportation or shipment, and as the defendant was compelled to receive it and could only store it on its right of way, in the absence of evidence that the wood was placed at an improper place or improperly piled, we must hold there is no evidence of negligence. As the fire originated accidentally, there is no difference in principle between this and the case of the private citizen who buys his winter's wood and stores it on his lot near his neighbor's house.

The case of *Insurance Co. v. R. R.*, 132 N. C., 78, is easily distinguishable from this in that there was evidence in that case that the defendant set out the fire and that it permitted cotton to remain on its platform near its track with the bagging off and the upper end of the bales with the lint bulged out and exposed to fire from the passing engines.

We are of opinion that judgment of nonsuit was properly entered.

Affirmed.

GEORGE O. GAYLORD v. LEVI BERRY.

(Filed 27 October, 1915.)

1. Judgments—Motions—Meritorious Defense—Findings—Prima Facie Case—Trials—Questions for Jury.

Upon motion to set aside a judgment for excusable neglect, where matters are stated by affidavit and relied upon as constituting a meritorious defense, the judge of the Superior Court hearing the motion should make his findings of fact from the matters set forth and draw his conclusions of law therefrom as to whether a *prima facie* case has been established; and if the movant in good faith shows facts which raise an issue sufficient to defeat his adversary, if found in his favor, this issue should be determined by the jury.

2. Appeal and Error—Findings of Fact—Judgments—Excusable Neglect—Questions for Court.

Upon appeal from the refusal of the Superior Court judge to set aside a judgment for excusable neglect where matters are alleged and relied upon as constituting a meritorious defense, the findings of fact of the judge will not be reviewed on appeal, but whether upon the facts found excusable neglect has been *prima facie* shown is a matter of law reviewable on appeal.

3. Judgments—Motions—Excusable Neglect—Evidence Sufficient.

Upon motion to set aside a judgment for excusable neglect, a *prima facie* case is shown by defendant, the movant, when he has established the facts that he employed and paid an attorney regularly practicing in the county wherein the action had been brought; that he put the attorney in possession of the facts relied upon as a defense; that the attorney promised to attend court and look out for the movant's interests, but failed to file an answer, and judgment by default was entered against him; that the movant acted with ordinary prudence and was not, himself, in default, and that his attorney is insolvent.

4. Appeal and Error—Motions—Judgments—Excusable Neglect—Insufficient Findings—Case Remanded.

On this appeal from the refusal of the judge of the Superior Court to set aside a judgment on the ground of excusable neglect, with proper allegation of facts upon the question of a meritorious defense, the case is remanded to the lower court with directions to set aside the findings and make new and fuller findings of fact, with leave to the parties to file additional affidavits, if they are so advised.

APPEAL by defendant from *Wedbee, J.*, at chambers; from BRUNSWICK.

Civil action, heard at chambers, on 4 May, 1915, upon motion of defendant to vacate the judgment therein.

The defendant had executed a mortgage to one J. R. Green, on his homestead in Brunswick County to secure a debt of $377.50. After the debt fell due, and was not paid, as alleged by Green, the latter advertised and sold the land under the power contained in the mortgage, and it was bought by the plaintiff, to whom a deed was executed by Green. Plaintiff then commenced this action for the possession of the land, obtained judgment by default for the want of an answer, and caused a writ of possession to be issued. Defendant moved to set aside the judgment on account of surprise, mistake and excusable neglect, and he alleged that as soon as the summons in this action was served upon him, he employed a reputable attorney to defend the action in his behalf and informed him of the facts; and that he had a good defense, and that his attorney failed to attend the court, for some reason not appearing, but without defendant's fault, after having promised him that he would give the matter proper attention, and specially that he would attend March Term of the court, the return term, enter an appearance for him and take charge of the defense. This he did not do, and judgment was taken against defendant, without his knowledge, until a few days after court

had adjourned. That he had satisfied the debt before the sale under the mortgage was advertised, and that his wife's signature to the mortgage was a forgery, as she had refused to sign it or to submit to a privy examination, none having been taken. J. R. Green was not examined as a witness to disprove this allegation of payment, though there was some evidence, if not very clear and convincing, and given only upon recollection, that the privy examination was regularly taken, but the notary admitted that there had been objection by the wife, due to her daughter's advice. There was other evidence not necessary to be stated. The judge decided that there was no excusable neglect, and no meritorious defense. He refused the motion. Defendant excepted and appealed.

C. Ed. Taylor for plaintiff.
John D. Bellamy for defendant.

WALKER, J., after stating the case: We do not think the findings of fact are sufficient for us to decide this matter without the danger of doing injustice to one or the other of the parties. The court refers to the affidavits and finds from them, but without stating the particular facts upon which he bases his opinion in law, that defendant has no meritorious defense. He seems to have passed upon the truth or falsity of the defense set up, and not to have treated it as presenting a *prima facie* case, which he should have done. Where a party, in good faith, shows facts which raise an issue sufficient to defeat his adversary, if it be found in his favor, it is for the jury to try the issue and not for the judge, who merely finds whether on their face the facts show a good defense in law; otherwise, the defendant, though he establish ever so clear a case of excusable neglect entitling him to have the judgment set aside, would be deprived of the right of trial by the jury of the issue thus raised. As the court has referred to what is stated in the affidavits as the ground of the ruling that there is no meritorious defense, we have examined them and find that they do state such a defense, if they correctly aver the facts, and especially when considered in connection with other circumstances. The court should have stated what the defense was, or the facts in regard to it, so that this Court could pass upon its legal merit. *Marsh v. Griffin*, 123 N. C., 660; *Oldham v. Sneed*, 80 N. C., 15; *Smith v. Hahn, ibid.*, 240; *Bryant v. Fisher*, 85 N. C., 69; *Winborne v. Johnson*, 95 N. C., 46; Clark's Code (3 Ed.), p. 310. We cannot review or reverse the judge's findings of fact on a motion of this kind, but we can revise his ruling upon the law, if erroneous, and what is excusable neglect is a question of law. *Powell v. Weith*, 68 N. C., 342.

If this defendant retained a reputable attorney, who regularly practiced in Brunswick Superior Court, paid him $35 as his fee; ap-

prised him of the facts, and the attorney promised to attend court and look after the defendant's interests, all of which he says was done, and the attorney failed to file an answer, and the defendant was not in fault himself, but acted with ordinary prudence, this would constitute excusable neglect. *Francks v. Sutton,* 86 N. C., 78; *English v. English,* 87 N. C., 497; *Wiley v. Logan,* 94 N. C., 564.

The standard of care required of a defendant is that which an ordinarily prudent man bestows upon his important business. *Roberts v. Allman,* 106 N. C., 391. In finding whether such care has been exercised the Court will consider, of course, all the facts and circumstances of the particular case. The attorney was not examined, nor was J. R. Green, the creditor, as to the allegation of the defendant that the debt had been satisfied. We do not, though, now decide upon the merits, as the findings of fact are too meager for that purpose. It was stated here and not denied, that the attorney is insolvent, and therefore defendant has no available remedy against him for failing in his duty. It may be that all the matters will be, hereafter, more fully explained and more clearly stated, and some missing facts supplied. All we now do is to remand the case, with directions that the court below set aside the findings and make new and fuller findings of fact, with leave to file additional affidavits, if the parties are so advised.

We attach no legal importance to what was done at Whiteville, N. C. It has no semblance of a judicial proceeding, but seems to have been merely an informal request, addressed to the judge, to set aside. There was no writing, and no record of it was made. It is difficult to understand whether the court refused the motion upon the ground that there had been a previous adjudication of it, or that there was no excusable neglect, or because the defense set up was not meritorious. We will not consider the merits, though, as injustice may be done if we should do so without all the essential facts being before us. The questions as to what constitutes excusable neglect and what is a meritorious defense are discussed in *Sircey v. Rees' Sons,* 155 N. C., 296.

Remanded.

A. A. GOINS ET ALS. v. TRUSTEES INDIAN TRAINING SCHOOL.

(Filed 27 October, 1915.)

1. Schools—Indians—Interpretation of Statutes.

Laws of 1885, chapter 51, providing for separate schools for Croatan Indians of Robeson County, claiming to be descendants of a friendly tribe once residing in Eastern North Carolina, and chapter 400, Laws of 1887, striking out the words "Croatan Indians" wherever they appear and inserting in lieu thereof the words "Indians of Robeson County," and the last named act amended by chapter 223, Laws 1913, striking out the words "Indians of Robeson County" and inserting in lieu thereof

the words "Cherokee Indians of Robeson County," do not restrict the pupils of the school to the children of the Croatan race who resided in that county in 1885, but include within their meaning those who have become residents within the limits of the school district in good faith from other or adjacent or neighboring territory.

2. Appeal and Error—Objections and Exceptions—Evidence—Competent in Part.

Where an *ex parte* affidavit has, by agreement of the parties, been received in evidence as a deposition, all irregularities being waived, and is competent in part, an exception thereto as a whole will not be sustained, it being required that the appellant should have specified the objectionable parts and excepted to them alone.

3. Appeal and Error—Material Error—Reversible Error.

The courts will not grant a new trial when the objectionable evidence admitted is merely technical, or is not of sufficient importance to justify a belief that, except for the error, the result would have been different.

4. Statutes—Interpretation—Affidavits—Intent and Meaning.

In interpreting a statute it is not permissible to show its intent and meaning by affidavit of legislators, for such must be gathered from the act itself.

5. Issues—Pleadings—Evidence—Schools—Indians—Immaterial Matters.

Issues are sufficient if they are determinative of the controversy and enable the parties to present every phase of the evidence relevant to the question involved, and the issue in this action to compel the admission of children into the school established for the Croatan or Cherokee Indians of Robeson County, as raised by the pleadings, being only as to whether the children were of Indian blood, it becomes immaterial whether the applicants had complied with the provisions of Revisal, section 4241.

APPEAL by defendants from *Allen, J.*, at the March Term, 1915, of ROBESON.

Johnson & Johnson, McIntyre, Lawrence & Proctor for plaintiffs.
McLean, Varser & McLean for defendants.

CLARK, C. J. This is a proceeding to compel the board of trustees of the Cherokee Normal School at Pembroke, in Robeson County, to admit the children of plaintiffs as pupils in that school. The plaintiffs contend that their immediate ancestors had lived in Sumter County, South Carolina, but had gone there from Cumberland County, N. C.; that they had no negro blood in their veins, and that their children are entitled to be admitted to said normal school under the statutes establishing it. The defendants contend that the plaintiffs' children are not entitled to attend said school, because: (1) Said children are of negro blood within the prohibited degree. (2) That said children did not belong to that class of persons designated as Croatan Indians, and now known as Cherokee Indians of Robeson County, under acts establishing said school.

The jury found the issue of fact raised by the above two propositions in favor of plaintiffs. The real controversy of law is raised by the defendants' contention that the act of 1885, ch. 51, "To provide for separate schools for the Croatan Indians of Robeson County," after reciting "Whereas the Indians now living in Robeson County claim to be descendants of a friendly tribe, who once resided in Eastern North Carolina on the Roanoke River, known as Croatan Indians," enacted that "said Indians and their descendants shall hereafter be known and designated as the Croatan Indians, . . . and shall have separate schools for their children, school committees of their own race and color, and shall be allowed to select teachers of their own choice," etc. It was, therefore, strenuously argued that these plaintiffs, though it was shown that their ancestors, a few generations back, resided in Cumberland County, had moved to South Carolina, and having recently removed from South Carolina to Robeson, could not come within the terms of the act above recited.

Chapter 400, Laws 1887, however, which established this normal school, was not so restricted, and provided that the purpose was to establish and maintain "a school of high grade for teachers of the Croatan race in Robeson County," and chapter 215, Laws 1911, amended the above recited chapter 51, Laws 1885, by striking out the words "Croatan Indians" wherever those words occur in said chapter, inserting in lieu thereof the words "Indians of Robeson County." Chapter 223, Laws 1913, amended the last named act by striking out the words "Indians of Robeson County" and inserting in lieu thereof the words "Cherokee Indians of Robeson County."

We find nothing in the act establishing the normal school, or in the acts of 1911 and 1913, above referred to, or in chapter 199, Laws 1913 (which provided further appropriation for the support of this normal school), which restricted the pupils to the children of the Croatan race who resided in Robeson in 1885. The court properly told the jury that the statute in regard to the normal school "did not embrace alone the Croatan Indians of Robeson County, but Croatan Indians who put themselves within the limits of the school in good faith and became residents within the limits, that would embrace them, though they came from other territory, adjacent territory or a neighboring territory." Section 4, chapter 123, Laws 1913, provides that "the Indians residing in Robeson and adjoining counties who have heretofore been known as Croatan Indians of Robeson County, together with their descendants, shall hereafter be known and designated as 'Cherokee Indians of Robeson County,' and shall be entitled to all the privileges conferred by any laws of the State upon the said Croatan Indians."

The defendants excepted to an affidavit which by agreement of counsel was considered as a deposition and all irregularities waived. The defendants concede that a part of the affidavit is competent. The burden was on them to single out the incompetent parts by their exception. Not having done this, their objection to the affidavit as a whole is insufficient. *S. v. Ledford,* 133 N. C., 722, citing many cases. Besides, even if a part of said affidavit had been admitted over a sufficient exception, it was not a matter of sufficient importance that we could see that it probably affected the result. Courts do not now grant new trials for merely technical objections, unless the error is of sufficient importance to justify a belief that if the error had not been committed the result, reasonably, would have been different.

The tender of a member of the Legislature to testify as to the object or meaning of the act of 1885 was properly rejected. The meaning of the statute and the intention of the Legislature cannot be shown in this way, but must be drawn from the construction of the act itself. *Robinson v. Lamb,* 129 N. C., 16.

The issue submitted was determinative of the controversy, and enabled the parties to present every phase of the evidence relevant to the question involved. It was in the same form as that submitted in *Gilliland v. Board of Education,* 141 N. C., 482, which was a case very similar to this. The only question before the jury in this case was whether plaintiffs had the right to attend the normal school, and this depended entirely upon whether they were of Indian blood in the degree specified by the statute. All the other contentions arise under a construction of the statutes creating the normal school, and were not for the jury to decide.

Whether the plaintiffs had complied with the provisions of Revisal, 4241, was immaterial. Issues arise upon the pleadings and not upon the evidence, and the answer in this case raised only the question of Indian blood.

The court twice charged the jury that the burden of proof was upon the plaintiffs to satisfy the jury, by the greater weight of the evidence, that the plaintiffs were entitled to attend these schools.

We think the case was fairly and fully presented to the jury by the learned judge. In the trial and judgment we find

No error.

ANNIE HILL, ADMINISTRATRIX, v. NORFOLK SOUTHERN RAILROAD COMPANY AND ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY.

(Filed 27 October, 1915.)

1. Railroads—Negligence—Pedestrian—Presumptions.

An engineer is not required to stop or slacken the speed of his running train upon seeing a pedestrian ahead of him on the track, in the apparent possession of his strength and faculties, and without information to the contrary; for he may act on the assumption that the pedestrian will use his own faculties for his own protection and will leave the track in time to save himself from injury.

2. Same—Helpless on Track—Duty of Engineer.

It is the duty of an engineer on a moving train, by reasonable watchfulness, to discover a man in front lying on the track or sitting on the cross-ties, in a helpless condition, or in a position of such evident peril that ordinary efforts on his part if exerted would not likely save him from injury, and when such conditions are or should be observable by the engineer in the exercise of proper care and observation, he should stop the train by every available means short of endangering the lives of his passengers, resolving all doubts in favor of the preservation of human life.

3. Same—Trials—Evidence—Nonsuit—Questions for Jury.

In an action to recover damages of a railroad company for the wrongful killing of the plaintiff's intestate at night, there was evidence tending to show that the intestate was subject to epilepsy, and at times liable to attacks in which he would lose consciousness and fall, one of the fits having occurred the day before he was killed; that the track at the point at which the intestate was killed and for a mile and a half was straight; that the intestate was killed at a place upon the track where one standing upright could have been seen by a witness who was looking down the track at the headlight of the approaching train that killed the deceased, and who could not have seen the deceased had he been lying down on the track at the time, and that this witness saw no one there. *Held*, evidence sufficient to be submitted to the jury upon the question of whether the intestate, at the time he was killed, was in a helpless condition on the track, or whether the defendant's engineer, in the exercise of the care required, should have seen him and stopped the train in time to have avoided the injury.

BROWN, J., dissents. WALKER, J., concurs in dissenting opinion.

APPEAL by plaintiff from *Rountree, J.*, at the November Term, 1914, of LENOIR.

Civil action to recover damages for the alleged killing of intestate by defendant company. At close of plaintiff's evidence, on motion, there was judgment of nonsuit, and plaintiff excepted and appealed.

Loftin, Dawson & Manning, G. V. Cowper for plaintiff.
Rouse & Land for defendant.

HOKE, J. It has been repeatedly held in this State that the "railroad engineer of a moving train who sees on the track ahead a pedes-

trian, alive and in the apparent possession of his strength and faculties, the engineer not having information to the contrary, is not required to stop his train or even slacken its speed because of such person's presence on the track. Under the conditions suggested, the engineer may act on the assumption that the pedestrian will use his faculties for his own protection, and will leave the track in time to save himself from injury" (*Abernethy v. R. R.,* 164 N. C., p. 91, citing *Talley v. R. R.,* 163 N. C., pp. 567 and 570; *Exum v. R. R.,* 154 N. C., 408; *Strickland v. R. R.,* 150 N. C., 4; *Beach v. R. R.,* 148 N. C., 152), a position that has been allowed to prevail where the person injured was sitting down on the track or cross-ties, apparently alert and attentive, and with nothing to indicate that he was unconscious of the train's approach. *Holder v. R. R.,* 160 N. C., p. 3, citing *Clegg v. R. R.,* 132 N. C., p. 293; *McAver v. R. R.,* 129 N. C., p. 380; *Hord v. R. R.,* 129 N. C., p. 305; and *Upton v. R. R.,* 128 N. C., p. 173. Again, it was held, among other things, in *Dean's case,* 107 N. C., p. 686: "If the engineer discover, or by reasonable watchfulness may discover, a person lying on the track asleep, or drunk, or see a human being who is known by him to be insane, or otherwise insensible to danger, or unable to avoid it, upon the track in his front, it is his duty to resolve all doubts in favor of the preservation of life, and immediately use every available means, short of imperiling the lives of passengers on his train, to stop it," a principle approved by this Court in many decisions on the subject, *Smith v. R. R.,* 162 N. C., p. 29; *Edge v. R. R.,* 153 N. C., p. 212; *Sawyer v. R. R.,* 145 N. C., p. 24; *Whitesides v. R. R.,* 128 N. C., p. 229; *Lloyd v. R. R.,* 118 N. C., p. 1010; and extended to include the case where one was sitting on the cross-tie, and it was evident from his position or otherwise that he had no present control of his faculties, *Henderson v. R. R.,* 159 N. C., p. 581; *Smith v. R. R., supra;* and, also, when he was in a position of such evident peril that ordinary effort on his part was not likely to save him from injury. *Snipes v. Manufacturing Co.,* 152 N. C., pp. 42 and 46, citing, among others, *Clark's case,* 109 N. C., pp. 430-33-34, and *Bullock's case,* 105 N. C., 180.

Considering the evidence in the light of these decisions, we are of opinion that there was error in the order of his Honor directing the nonsuit. As we understand the record, and under the rule uniformly observed, that when a nonsuit is ordered the testimony making for plaintiff's right of action must be taken as true, and viewed in the aspect most favorable to him, there were facts in evidence tending to show that on or about 23 December, 1911, in the early part of the night of that day, the intestate was run over and killed by a passenger train of defendant coming from Kinston towards LaGrange; that at the point of the killing the railroad track was nearly level and

straight for a distance of 1½ to 2 miles from Fields Station beyond, to the point where intestate was killed; that a short while before the killing, a witness saw the intestate and talked with him, and he was then sober and was going down the railroad, or on a path along the side of the track, just about train time, and was killed about 200 yards from Dawson's Crossing, a place where the county road crosses the railroad.

A witness by the name of Noah Colie, testifying for plaintiff, said, among other things, that at the time of the killing he was driving along the county road in a buggy, coming from LaGrange, and as he came near the crossing, his mule being afraid of the train, he got out of the buggy to hold his mule and was looking down the track towards the train; that he could see the headlight of the engine for two miles from the time it came around the curve at Fields Station, the road being straight for a mile and a half, and he could see practically right down the track, and was looking towards the train, and if a man had been walking along the track or standing up he could have seen him, but if he had been "lying down he could not have seen him" at the point where he was killed, because there was a cut there, "gradually growing lower," that shut off the view when the man was lying down. This point was about 200 yards from where he was standing, and between him and the approaching train. In the language of the witness on this point: "When I saw the train coming around the curve, my point of view was practically right down the track; in other words, I was looking right down the track towards Mr. Fields. I did not see anybody," and again: "I could not see a man when he was lying down, where the accident occurred, because the cut there obstructed my view."

Another witness, by the name of Thomas, testified that at a subsequent time he had gone to the place with the witness Colie, and, standing where Colie was, he "saw a man walking down the track towards Kinston from the point where Mr. Colie was to where Mr. Hill was killed, but, when he lay down on the track at that point, he was out of sight; you could not see him. You could see him when he stood up, but could not see him when he lay down."

It was further proved that, latterly, the plaintiff, while ordinarily a strong man and able to work, was subject to epilepsy, and was, at times, liable to attacks in which he would lose consciousness and give way; that he had had such an attack the day before he was killed, and witnesses said that, in the times they had seen him so, he would have fallen if he had been by himself or not in some way supported, etc., etc.

True, our decisions are to the effect that when it is shown merely that a person on the track of a railroad company, without license, express or implied, has been run over and killed by one of its trains, liability may not be imputed (*Clegg v. R. R.*, and authorities cited); but

the present case cannot be brought within any such principle. As the case goes back for another trial, we do not consider it desirable to dwell at length on the evidence offered in support of plaintiff's claim, but on testimony for plaintiff tending to show that a witness was looking down a straight track for a mile and a half to two miles, seeing the headlight of the engine for that distance; that the deceased was run over and killed between the witness and the approaching engine; that he could have seen the deceased if he had been standing up, and did not see him, but, at the point where he was killed, the witness could not see him when lying down, owing to a small cut on the railroad, and the witness, 200 yards off, standing just to one side of the track, on the county road, and the further fact stated, that the deceased had of late developed a case of epilepsy, throwing him at times into spells or fits which were likely to render him unconscious and cause him to fall, and that he had just had such an attack the day before, we are of opinion that there are facts in the record, amounting to legal evidence, and which tend to show that the deceased, at the time he was killed, was down and helpless on the track, and that this and the issue as to defendant's liability must be referred to the jury for decision. *Barnes v. R. R.*, 168 N. C., p. 512; *Tyson v. R. R.*, 167 N. C., p. 215; *Smith v. R. R., supra; Arrowood v. R. R.*, 126 N. C., p. 629; *Powell v. R. R.*, 125 N. C., p. 371.

There was error in the order of nonsuit, and the same will be set aside and the cause submitted to the jury.

Error.

BROWN, J., dissenting: I fully agree with the opening citation in the opinion of the Court from the *Abernathy case*. It is the well-settled law of this State. Applying it to the evidence of this case, I am of opinion that the learned judge of the Superior Court did not err in sustaining the motion to nonsuit. A careful examination of the evidence set out in the record, in my opinion, fails to disclose any real evidence that the plaintiff's intestate was lying down helpless upon defendant's track, and while in such condition was run over and killed by a train.

The burden of proof is upon the plaintiff to prove by the clear weight of the evidence:

1. That the deceased was down on the track in an apparently helpless condition.

2. That the engineer could have discovered him in time to stop the train before reaching him, by the exercise of ordinary care.

3. That he failed to exercise such care, and as a direct result, deceased was killed. *Clegg v. R. R.*, 132 N. C., 294; *Henderson v. R. R.*, 159 N. C., 581; *Holder v. R. R.*, 160 N. C., 7; *Stout v. R. R.*, 132 N. C., 416; *Ward v. R. R.*, 167 N. C., 148.

There is nothing worthy of the name of evidence that tends to prove the first of these propositions. What is offered as evidence is only the merest conjecture and surmise. Because the intestate was subject to occasional fits of epilepsy is no evidence that on this occasion he was seized with an attack and fell helpless upon the track. The fact that his body was mangled is likewise no evidence that he was prostrate and helpless upon the track when the engine struck him. There is nothing in the evidence inconsistent with the theory that the intestate may have been walking or sitting on the track when struck by the engine, or with the theory that he may have fallen upon the track when it was too late to stop the engine.

There is evidence that the track was straight, and that the headlight of the engine could be seen at some distance, but there is no evidence that the engineer could have discovered the figure of a man prone upon the track in time to have stopped the train. What is assumed to be evidence is mere guess-work.

MR. JUSTICE WALKER concurs in the dissenting opinion.

CAROLINA HARDWARE COMPANY ET ALS. v. RALEIGH BANKING AND TRUST COMPANY AND J. B. CARR & CO. ET ALS.

(Filed 27 October, 1915.)

1. Courts—Terms—Motions—Notice—Pleadings—Amendments.

Parties to an action are presumed to take notice of motions made therein at regular terms of the court; and actual notice of a motion to amend a pleading thus made is not required to be given the adverse party. Hence when an amendment is permitted by the court, on motion of a party, at the term set for the hearing of the action, it is not required that the adverse party should have had actual knowledge thereof, for such knowledge is implied.

2. Mechanics' Liens—Pleadings—Amendments—New Contract—Material Furnished—Direct Obligation.

Amendments to pleadings which substantially set up a new cause of action are not allowable by the trial judge as a matter within his discretion, but this does not apply when the amendment only adds to the original cause of action; as where an action is brought to establish a mechanic's lien, alleging that the materials, etc., were furnished the subcontractor, and an amendment is permitted alleging in effect that they were furnished to the contractor under an agreement that the owner would pay for materials, etc., purchased by the contractor, when it was ascertained that the latter was financially unable to complete the building according to the original contract.

3. Same—Court's Discretion—Reference—Findings by Judge—Evidence—Appeal and Error.

It is the policy of our Code procedure to liberally allow amendments, so that causes may be tried upon their merits and avert failure of justice,

and to that end, when the amendments do not substantially set up a new cause of action, it is within the reasonable discretion of the trial judge to allow them after verdict or judgment so as to conform the pleadings to the facts proved; and where, after the report of a referee in a cause referred, the trial judge permits amendments, consolidates the case with others, and, as thus consolidated, rerefers them, it is within the reasonable discretion of the trial judge, upon the hearing of the referee's report of the consolidated cases, to permit the other plaintiffs to amend according to the amendments theretofore filed.

4. Mechanics' Liens—Abandonment of Contract—New Contract—Direct Liability—Materials Furnished—Principal and Agent—Undisclosed Principal—Consideration.

Where an action to enforce against the owner a lien of a materialman has been referred, and the judge, upon the coming in of the report, and from the facts stated therein and supported by the evidence, finds that the owner and contractor agreed that the latter, who was financially unable to complete his contract, should thereafter purchase the materials, etc., for which the owner should pay. *Held*, the agreement thus made in effect constituted the contractor the agent for the owner, and that the materialman, in consideration of the benefits the owner had received, had the right to sue thereon and establish a direct obligation from the owner to him; and *Further held*, that it made no difference as to whether the materialman knew of this new agreement at the time he furnished the materials, under the doctrine that an undisclosed principal may be bound by the simple executory contracts of the agent, made for his benefit, when he is afterwards discovered to be such.

APPEAL by defendant from *Daniels, J.*, at the February Term, 1915, of WAKE.

The above entitled action, with similar actions by J. C. Grinnan and Dorrence Terra Cotta Company, The Raleigh Iron Works Company, Powell & Powell, Inc., and Young & Hughes, against the above defendants, were pending in the Superior Court of Wake County, and, by a consent order, were consolidated in one action. The cause was referred to a referee, who took the evidence and made his report, stating his conclusions of fact and law. The plaintiffs filed exceptions thereto, and upon the hearing the Superior Court, *Daniels, J.*, presiding, sustained the exceptions to the referee's conclusions of law, and rendered judgment for the plaintiffs. The defendant the Raleigh Banking and Trust Company excepted and appealed.

John W. Hinsdale, Jr., Clark & Broughton, R. C. Strong, Manning & Kitchin for the plaintiffs.

Jones & Bailey, Walter L. Watson for the defendants.

BROWN, J. These several actions, which have been consolidated and tried as one action, were brought to secure and enforce a lien for material furnished and used in the construction of the banking house of the defendant the Raleigh Banking and Trust Company, in the city of Raleigh, and to collect the sums due each of said plaintiffs therefor from said trust company.

Due notice, according to the statute, was given to withhold the sums claimed from the contract price for the construction of the building.

In his first report the referee finds that the trust company had overpaid the contractors, over and above the amount due them on the contract price by $25,423, six months prior to the filing of plaintiffs' liens, and concludes, as matter of law, that the said trust company is not indebted to the plaintiffs in any sum, and that they are not entitled to any lien on the bank building for the materials furnished to J. B. Carr & Co., the contractors.

Upon the coming in this report two of the plaintiffs were allowed to amend their complaints by adding the following amendment:

"That the contract alleged in the next preceding paragraph was, in accordance with its terms, to have been completed in August, 1912, and that the trust company and its contractor, finding that a large part of the contract had not been performed by the contractor, according to its terms, then entered into a new contract with the defendant contractor wherein it was agreed that the said contractor should perform his original contract, with the provision that the defendant trust company would pay for the material, labor, etc., to be then purchased by the said contractor and necessary for the completion of the said building. The building was completed in August, 1913, and accepted by the defendant trust company."

The cause was rereferred and the referee reported his findings of fact and conclusions of law, holding the said trust company not liable for the plaintiffs' demands. To this conclusion of law the plaintiffs excepted. The judge sustained the exception, and upon the findings of fact, as made by the referee, adjudged that the said trust company is liable to plaintiffs, and rendered judgment accordingly.

The defendant first excepts to the order of the court allowing the amendments to the complaint, on the ground that the defendant had no notice of the motion to amend. It appears that the motion was made at the regular term of the court by the plaintiffs the hardware company and Young & Hughes, and was granted without notice to the defendant. It is well settled that no notice of a motion is required to be given to the adversary party when the motion is made at a term when the cause stands for trial. Parties to actions are supposed to take notice of any motion that may be made in a cause when it is made during the terms of the court. *Hemphill v. Moore*, 104 N. C., 379; *Erwin v. Lowry*, 64 N. C., 321; *Stith v. Jones*, 119 N. C., 428.

The defendant contends, in the second place, that the amendment introduced into the proceeding a new and distinct cause of action from the one stated in the original complaint. It is well settled that the court cannot, except by consent, allow an amendment which changes

the pleadings so as to make substantially a new action, but it is also settled that an amendment which only adds to the original cause of action is not of this nature and may be allowed in the sound discretion of the trial judge. *Ely v. Early,* 94 N. C., 1; *Craven v. Russell,* 118 N. C., 564.

We do not think that the effect of the amendment in any way changed or added to the original cause of action. The gravamen of the original complaint is to the effect that the defendant, the trust company, is indebted to the plaintiff for material and supplies furnished in erecting its building. The plaintiffs first proceeded to acquire a lien upon the building for the material furnished under the statute. The plaintiffs failed in this because it turned out, as represented by the referee, that the defendant owed the contractor nothing. But upon that investigation it turned out, and was so reported by the referee, that the contractor had failed in his contract, practically, and in order to complete the building the defendant agreed in August, 1912, to pay for such supplies and material as was necessary to finish it. This does not create a new cause of action. It simply gave the plaintiffs another legal ground for the collection of the same demand.

Upon this principle it was decided that where a complaint alleges that the defendant had converted, wrongfully, money belonging to the plaintiff, thereby setting up a tort, an amendment alleging that the defendant had received the money as trustee, and thereby changing somewhat the character of the action, was allowable in the discretion of the court, as it neither asserted a cause of action, wholly different from that set out in the original complaint, nor changed the subject-matter of the action, nor deprived the defendant of any defenses which he would have had to a new action. *Parker v. Harden,* 122 N. C., 111.

The defendant further objects to the said order of amendment, because it was made after the referee had made his second report. It appears that the amendments to the complaint of Young & Hughes and the hardware company were allowed before the cause was heard the second time by the referee, but after the order of consolidation. When the cause was reported by the referee the second time and heard by *Judge Daniels,* he ordered that all the plaintiffs be allowed to amend their complaints so as to allege the agreements made in August, 1912.

The policy of Code procedure as to the allowance of amendments is very liberal, the leading purpose being to have actions tried upon their merits and avert a failure of justice. Therefore, amendments to the pleadings are allowed, not only before trial, but even after judgment, and when the amendment does not change substantially the claim or defense, it may be allowed after the verdict or after report of the referee, so as to conform the pleadings to the facts proved.

Our statute provides that the judge or court may, before and after judgment, in furtherance of justice and on such terms as may be proper, allow amendments to the pleadings or process. Rev., sec. 509; *Blalock v. Clark,* 133 N. C., 309; *Simpson v. Lumber Co.,* 133 N. C., 99.

The only other assignment of error we deem it necessary to consider goes to the very heart of the controversy: that the court erred in finding as a fact that the defendant trust company ascertained in August, 1912, that its contractor was insolvent, and that the said defendant agreed with its contractors, Carr & Co., that the trust company would pay for all materials and labor thereafter required to complete said building in accordance with the plans and specifications.

His Honor, in his judgment, found the following facts:

"That in August, 1912, the defendant bank, through its president, Charles E. Johnson, who was likewise chairman of the building committee having in charge the erection of the bank building for said trust company, ascertained that the said J. B. Carr & Co., the general contractors, as found by said referee, were insolvent, and were unable to complete the said building in accordance with their said contract and to supply the labor and materials necessary to complete it, and to pay their subcontractors for the necessary materials and labor contracted with for them to be used in the completion of said building, required the said J. B. Carr & Co. to furnish to the said trust company an itemized statement of all amounts due by him for labor and materials furnished and performed on said building, and also all outstanding and unperformed contracts for material and labor necessary to be used in the completion of said building in accordance with the plans and specifications therefor.

"And upon receiving the said itemized statements aforesaid, the said banking and trust company, through its president, Charles E. Johnson, agreed with the said J. B. Carr & Co. that the said bank would pay for all labor and materials then due and all materials and labor required to complete the said bank building in accordance with said plans and specifications. And in the list of subcontracts furnished the said banking and trust company by the said J. B. Carr & Co., the contracts with the plaintiffs were stated, and the amounts to become due were stated in said itemized statement furnished, as follows: J. C. Grinnan and Dorrence Terra Cotta Company, $4,620; Powell & Powell, $46.45 (paid September 18); Raleigh Iron Works, $1,180.06; Young & Hughes, $1,865 (paid August 6, $96.65; August 31, $200; September 18, $100; October 9, $300; October 26, $100); Carolina Hardware Company, $25.67 (paid 14 September, $33.44).

"And in pursuance of this agreement by the said Raleigh Banking and Trust Company with the said J. B. Carr & Co. in August, 1912,

the said plaintiffs furnished materials and did work required by the specifications for the said bank building, and used in said bank building with the knowledge of the said Raleigh Banking and Trust Company.

"And it is further found as a fact that in August, 1912, the defendant trust company, in order to get its building completed, and in consideration thereof, agreed with its codefendants, J. B. Carr & Co., that it would pay for all materials which thereafter should be purchased by the said J. B. Carr & Co. and used in the said bank building."

His Honor did not reverse any finding of fact made by the referee, but adjudged that upon the findings made by him the trust company was indebted to the plaintiffs upon the contract made in August, 1912, and in this conclusion we think his Honor was correct.

It is contended that there is no evidence and no finding of the referee to support the judgment of the court. We think there is both a finding and evidence sufficient to support it. The Supreme Court has no jurisdiction to review the findings of fact made by the Superior Court when there is evidence to support those findings. The evidence reported by the referee, in our opinion, is sufficient to justify his Honor in finding, from that evidence, that when the trust company saw that its building would not be completed, and that its contractor had broken down, its officers authorized the contractor to purchase the necessary material to complete the building, and agreed to pay for it.

It is not necessary that this contract should have been made directly with these plaintiffs. If the facts be true, as reported by the referee and found by his Honor, then Carr was constituted agent of the trust company and duly authorized to purchase the material necessary to complete the building. The benefits to accrue to the trust company were sufficient consideration to support such new agreement. When that agreement was made, the trust company undertook to complete the building itself. Carr then became its agent, and not an independent contractor.

The material furnished by these plaintiffs became the direct obligations of the trust company, and not those of the original contractor. It is immaterial whether the plaintiffs knew of the new agreement made in August, 1912, although it is found that they had knowledge of it. The liability of the agent is not exclusive. Although the plaintiffs extended credit to Carr in ignorance of the fact that he was acting for the trust company, the plaintiffs had the right to hold the undisclosed principal liable when discovered. It is well settled that an undisclosed principal is bound by executory simple contracts made by the agent and by the acts of the agent, done in relation thereto, within the scope of his authority and in the course of his employment. 31 Cyc., page 1574, and cases cited in the notes; *Nicholson v. Dover,* 145 N. C.,

18; *Combes v. Adams*, 150 N. C., 68; *Peanut Co. v. R. R.*, 155 N. C., 148.

Upon a review of the whole record, the judgment of the Superior Court is

Affirmed.

MRS. M. G. JONES v. R. G. LASSITER AND THE CITY OF RALEIGH.

(Filed 3 November, 1915.)

1. Injunction—Public Benefits.

The construction of public utilities, or works for public benefit, will not be restrained at the suit of private individuals, unless the damages caused thereby are both serious in amount and irreparable in character; and where a contractor for paving streets of a city with a combination of asphalt and concrete has located his mixing and heating apparatus near the boarding-house of the plaintiff, and it is found by the trial judge that the location was a proper one for the character of the work, which was for the public benefit, and that the defendant was able to respond in damages for the injuries caused, an order restraining his work to the final hearing will be denied.

2. Same—Main Relief—Prima Facie Case—Trial by Jury.

Where relief by injunction is the principal remedy sought in a suit, the courts will generally continue it to the hearing upon plaintiff's making out a *prima facie* case; but this rule has no application where important public works and improvements are sought to be stopped, for in such instances the courts will ordinarily let the facts be found by the jury before interfering by injunction.

APPEAL by plaintiff from an order of *Cooke, J.*, dissolving an injunction, at the September Term, 1915, of WAKE.

Douglass & Douglass for plaintiff.
Armistead Jones & Son, B. H. Perry for Lassiter.

BROWN, J. This action is instituted to recover damages for alleged injury to plaintiff's property, health and business, caused by the operation of an asphalt mixing plant near her residence in the city of Raleigh, and to perpetually enjoin the defendant Lassiter from the operation thereof.

On 14 October, 1914, Lassiter entered into a contract with the city of Raleigh to pave its streets with a combination of asphalt and concrete, carried through a high heating process, and required to be under a sufficient heat at the time of laying same upon the streets, and it was necessary that the plant be located as near to the streets to be improved as practicable, so that the heat, to a high degree, might be retained in transit to the street.

The defendant Lassiter located his plant upon the right of way of the Seaboard Railway, in the midst of various shops and foundries there situated, and about 175 feet from plaintiff's dwelling. The judge below finds (1) that the gritty dust that came from the grinding of the stone, when the wind was blowing from a northern direction, was thrown upon and against her house and furniture, thereby greatly damaging her property; (2) that the throwing out of the said fine particles of dust and the emission of smoke was a menace to her health and others in her dwelling-house, and which was being used as a boarding-house, and that because of the condition referred to her boarders were threatening to leave, which would seriously affect her means of securing a livelihood; (3) that the fine particles of gritty dust and smoke being blown into her eyes have produced soreness in one of her eyes, which will at least become chronic if the condition continues. It is admitted that the defendants are solvent and fully able to respond in damages for any amount that may be recovered.

The court also finds that the machine is in the most fitting location to accomplish the important work of building the streets, and that to stop the work would greatly interfere with the public good. An injunction until the final hearing was refused, but the injunction is made effective on and after 1 January, 1916.

The right to grant an injunction effective on that date is not before us, as defendants did not appeal. It has been repeatedly held by this and other courts that the construction or use of public utilities will not be enjoined at the suit of private individuals, unless the damage is both serious in amount and irreparable in character. It is against public policy to restrain industries, public improvements and enterprises prosecuted for the public good and that tend to develop the country and its resources. *Waste Co. v. R. R.*, 167 N. C., 340; *Griffin v. R. R.*, 150 N. C., 312; *Berger v. Smith*, 160 N. C., 205. Private rights must sometimes yield to the public good, certainly upon compensation.

It is true that when the injunctive relief sought is not merely ancillary to the relief demanded, but is, itself, the principal relief sought, the courts will generally continue the injunction to the hearing upon the making out of a *prima facie* case. *Marshall v. Commissioners*, 89 N. C., 103.

But this rule does not hold good in cases where important public works and improvements are sought to be stopped. In such matters, in the interest of the public good, the courts will let the facts be found by a jury before interfering by injunction. The right of this plaintiff to recover damages for her alleged injuries is not now before us.

Affirmed.

RULES OF PRACTICE

IN THE SUPREME COURT

(For others in force, see 164 N. C., p. 638.)

It is ordered by the Court that the Tenth and Eleventh districts be separated, and that each district be allowed one week each, commencing on Tuesday. It is ordered that appeals from the Third and Fourth districts be heard together during the week heretofore assigned to the Third District, commencing on Tuesday morning.

The clerk will arrange all the districts consecutively in accordance with this order, so that the districts argued together during same week will be the Third and Fourth, Eighth and Ninth, Fifteenth and Sixteenth, and Seventeenth and Eighteenth.

For Rule 28, as printed in 164 N. C., 548, 549, substitute the following:

28. Printing Records.

Twenty-five copies of the transcript sent up in each action shall be printed, except in pauper appeals: *Provided,* it shall not be necessary to print the summons, publication of summons, and other papers showing service of process, if a statement signed by counsel is printed giving the names of all the parties and stating that summons has been duly served. Nor will it be necessary to print formal parts of the record showing the organization of the court, the constitution of the jury, etc. In pauper appeals the counsel for the appellant shall furnish a sufficient number of typewritten or printed briefs for the use of the Court, giving a succinct statement of the facts applicable to the exceptions, and the authorities relied on, *and shall also furnish at least five typewritten copies of the transcript of appeal in addition to the original transcript.* Should the appellant gain the appeal, *the cost of preparing the copies of typewritten brief and transcript shall be taxed* against appellee.

The printed transcript shall be in the order required by Rule 19 (1) and shall contain the grouped and numbered exceptions and index required by Rule 19 (2) and (3), though for economy the marginal references in the manuscript, required by Rule 11 of the Superior Court, may be printed as subheads in the body of the record, and not on the margin. The transcript shall be printed immediately after docketing the same, unless it is sent up printed.

PRESENTATION OF THE PORTRAIT

OF

MR. JOSEPH HARVEY WILSON

TO THE

SUPREME COURT OF NORTH CAROLINA

BY

JUDGE FRANCIS I. OSBORNE

21 APRIL, 1914*

Judge OSBORNE said:

I have been requested by his surviving son to present a portrait of the late Mr. Joseph Harvey Wilson, of Charlotte, to this Court, and I gladly accede to the request.

Upon his death, noble words were spoken of him by his brethren of the bar, notably Col. H. C. Jones, Judge W. J. Montgomery, and the presiding judge, A. A. McKoy. I cannot now recall the exact words of the speakers, but remember well the keynote of their addresses.

Colonel Jones spoke of the exalted purity of the life of Mr. Wilson and his influence over the members of the bar. Judge Montgomery spoke of his legal acquirements and his marvelous success as a lawyer, and Judge McKoy, in words of surpassing beauty, of the loss which the State had suffered in the death of so noble a citizen.

Thirty years have flown by since then; nearly a whole generation has passed away. The eulogists have gone to join the eulogized, and the eulogies are for the most part but tradition or history in the forgotten files of contemporary newspapers. The members of the bar and those of his fellow-citizens who knew him well are now few indeed. His name, his mind, his character and person are but a memory.

Today I greet and pay obeisance to that memory and shall endeavor to depict it, as it stands before me, in faithful colors, for the purpose of strengthening and refreshing it in the minds of those who knew him, and, let us hope, for the benefit and instruction of those who knew him not—especially the younger members of the bar. The affection, gratitude and respect which I bear him call for words of praise from me, which are but words of truth.

He needs no false eulogy or flattering portraiture at my hands. To indulge in them would be recreant to the proprieties of this occasion, disloyal to him whose whole life was a devotion to every virtue that belongs to the great family of truth. It would be, indeed, exceedingly indelicate in me to flatter him, dead, who when living flattered no one, and scorned all false praise from others.

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*This address has but recently been furnished.

In this Southern land we are very much prone to the habit of conferring unearned titles upon acquaintances and even strangers.

Colonels, majors, who never saw war, and judges who never sat upon a judicial bench, surround us everywhere; but he whom I now honor, after the manner of England's great Commoner, went through life with a name unadorned with borrowed title. "Mr. Wilson" he lived and labored, attained success in his profession; as "Mr. Wilson" he died, and as "Mr. Wilson" we cherish him in our recollection.

It is said in one of Bulwer's novels, "The Caxtons," that the Duke of Wellington was once passing on the streets of London. Some young man remarked, "There goes the Duke," and his companion asked, "What Duke?" "Why, the Duke of Wellington, stupid." So, within a narrower sphere, Mr. Wilson was THE Mr. Wilson by preëminence. In the large judicial district in which he practiced I doubt not if any man had remarked, "There goes Mr. Wilson," any hearer would have known that he meant Mr. Joseph Harvey Wilson, of Mecklenburg County.

As such, I will endeavor to give some slight sketch of his life and character.

He was born September, 1810, at the home of his ancestors in Mecklenburg County about nine miles northeast of Charlotte, near Philadelphia Church. He was the son of the Reverend John McKamie Wilson, a distinguished Presbyterian minister and a great educator. His mother, Mary, was a daughter of Alexander Erwin, a Revolutionary patriot, thus relating Mr. Wilson to the Waightstill Averys, the McDowells and other prominent figures of that time.

Mr. Wilson was prepared for college by his father, and so remarkably precocious was his intellect that he entered college in the Junior class at thirteen years of age, graduating with honor at fifteen. After obtaining his degree he returned to reside a short time at his home, without engaging in any active business, by reason of his youth.

Success greeted him at the threshold of his career and walked hand in hand with him until his death, which occurred in September, 1884.

His compeers at the bar were Judge Nathaniel H. Boyden, of the Supreme Court bench, the Honorable Thos. S. Ashe, of this body, Judge Jas. W. Osborne, of the Superior Court, and the Honorable Haywood Guion, a lawyer of great ability and a writer of note in his day. Later in life, his compeers were Judge Wm. P. Bynum, Senator Z. B. Vance, the Honorable Clement Dowd, Col. Hamilton C. Jones, and many of the younger members of the profession.

I have said that he was successful at the start. It would have been, indeed, marvelous if he had been a failure. Wherever the English law pertains, no matter in what country, he would have been amongst its foremost practitioners. Of strong natural parts, ever an intense student

of his profession, he brought into his practice a profound knowledge of law and business methods. He had deeply studied all our ancient authorities. He drank in law at the fountain head, but he kept abreast with the current as it flowed.

He read and studied the contemporary decisions of the Court, and there was no opinion from this bench, settling any important question, with which he was not thoroughly familiar.

Besides his knowledge of books, he studied men. He was a close observer of their actions, a keen inspector of their motives. He was never the dupe of misplaced confidence.

He did not take chances in the investment of his time, his talent, or his money. He builded no castles in the air. He was a plain, practical business man, and not a dreamer of dreams. But above and beyond his knowledge of books, of his profession, in the practical affairs of life, stood prominently that character for integrity which made his name a synonym of honesty and fair dealing. Amongst able men and great lawyers, he stood the foremost, as a wise and prudent counselor, skillful draughtsman of conveyances, contracts and pleadings.

If success is to be measured by triumphs in the forum, he was the equal of any of these gentlemen I have mentioned, and if it is to be measured by the confidence of the entire business community, the number of responsible clients and the well-earned rewards of a lucrative profession, he was the superior of any of them.

As an advocate Mr. Wilson was successful. He did not aspire to eloquence, as we generally understand the term, but if the definition of Charles James Fox be correct, that "eloquence is logic set on fire," then he was eloquent indeed.

He did not adorn his addresses with flowers of speech. He rarely ever used an illustration or told an anecdote. His object was not to appeal to the imagination with figures of rhetoric, or to amuse the fancy with jest. He sought only to convince, or rather, it seemed, to inject his own convictions into the mind of the court and the jury. The strength of the speaker lay in his clearness, his intense earnestness, and his ability to impress his audience with the sincerity of his convictions. He was clear, for his thought was always clear. He never went into the trial of a case without thoroughly mastering it in all its details, both as to facts and law. He rarely ever spoke without premeditation and preparation. Out of a redundant vocabulary of plain, strong words, for the most part of Anglo-Saxon derivation, he could pour forth sentence after sentence, closely connected, all well rounded and complete, with every word in its proper place, and each one bearing its appropriate part in conveying the idea he sought to impress upon his hearers.

Everywhere natural, and nature having endowed him with great dignity of mind and character, he brought into the courtroom that dignity

of manner which belongs peculiarly to an older generation of lawyers. Always respectful to the court, courteous and even courtly to his opponents, he enforced by his conduct respect and courtesy from others. Nothing could distract him from the issue before his mind. The cause which he had so thoroughly mastered in his office seemed to have mastered him. He lost his entire personality in his zeal. Wit at his expense was an idle summer wind. I have often seen it tried by the very genius of wit itself, Senator Vance, but however amusing to others, the shaft fell harmless on that dignity which clothed as a garment this grand gentleman of the old school.

It is to speak words of supererogation to say that in all his practice he was honorable; that he knew no short cuts to success. Written agreements with him were superfluous. His word was his bond. No matter how fierce the controversy, how important the issue, how intense his own zeal for his client's cause, he never made an enemy in the courthouse.

There was always one limit to his partisanship that he strictly observed. It was his own honor. "That was aye his border." All his adversaries knew it, and therefore cherished no enmity towards him, for lasting animosity is not the child of good faith and honor. It is the legitimate offspring of fraud and deceit. But Mr. Wilson had no enemies at the bar. Whether opponents or not, all its members respected him, and those who were thrown in close relationship with him were his friends.

In his action in speaking (and I mean merely physical action, not the action that is spoken of by Demosthenes, which seems to my mind to embrace the entire domain of public speaking) he was graceful and forceful. Considerably above the ordinary height, of a form the model of symmetry, erect in stature, all his gestures were consonant with the thought and its expression.

I have said before that he thoroughly understood his cases. I should have quoted a far higher authority than myself. Chief Justice Pearson, who rarely ever complimented any one, and who when he did meant more than he said, in discussing the members of the bar of about his own age, attributed Mr. Wilson's success to the fact of his clear understanding of his cases.

I cannot agree with him who said that the legal mind displays its power in illustrating the obvious, explaining the evident.

In my opinion, to understand fully an intricate law case requires the highest exercise of the mental faculties. But it was not simply in understanding this or that particular case that the powers of Mr. Wilson's mind were displayed to their fullest extent. It was in his profound knowledge of general legal principles, and his ability to apply them to new conditions.

In the busiest period of his life, if not the most important, there occurred the well known revolution in our practice and pleading. In 1868 the Code was adopted, abolishing the distinction between actions at law and suits in equity, and establishing one form of action. It was almost impossible for us who have been bred under the new forms of pleading to understand with what difficulty those older lawyers who had spent their lives in the study of Chitty and Stephens, and filing bills and answers in equity thereto, could reconcile themselves to the new order of things. It seemed to them that they had to forget all the old paths they had trod, and blaze out a new way in a barren wilderness of legal thought without a guide.

To Mr. Wilson's credit be it said, though he preferred the single issue to the multiplication thereof, and thought the more numerous issues were calculated to confuse rather than enlighten the jury, and really was devoted to the old equity practice, he did not despair of fully understanding the new. Being so well versed in the science of good pleading which the old law contained, he brought his knowledge of the old to shed light on the new practice, and soon became a master thereof.

Out of the throes of those times were evolved more important changes than mere pleading and practice. The organic law of the State itself was amended by adopting the homestead and personal property exemptions therein. This laid before the whole profession a wide field of thought.

From the downfall of the Confederacy the relations of trustee, *cestui que trust*, guardian and ward were much disturbed. What might be the rights and responsibilities growing out of such relations were for the courts to tell us anew, for trust funds had been invested in securities which had been sanctioned by the law, at the time the investments were made, but which had become thoroughly worthless by the results of the war.

Contracts, perfectly legal during the predominance of the Confederacy, at the time they were made, were declared illegal by act of Congress, and the contracts that were valid had to be solved in the legal tender of the United States Government, upon a scale provided by statute.

In the settlement of these grave questions before the court Mr. Wilson bore a conspicuous part. How well he bore it is best illustrated in the volumes of our Supreme Court reports. Time would fail me to detail the important cases in which he appeared.

In summing up the universal opinion of his mind in its operation, I could not do better than to quote from Lord Macaulay's remarks, concerning Charles Montague, the father of English public finance:

"It has long been usual with us to represent the imagination under

the figure of a wing, and to compare the successful exertion of imagination to a flight.

"Thus, an orator or a poet, as the case may be, is an eagle, and another a dove, and a third, more modest, a bee. Neither of these types would have suited Montague. His genius may be compared to that strong pinion which, though it is too feeble to lift the ostrich in the air, when she confines herself to the surface of the earth, enables her to outrun hound, horse and dromedary.

"When a man with genius like this attempts to ascend to a heaven of invention his awkward and unsuccessful efforts expose him to derision, but if he is content to stay in a terrestrial region of business, the faculties which could not enable him to soar in the air, he soon finds enable him to distance all competitors on the lower sphere."

Here the parallel ceases, for Montague did attempt to ascend the heaven of invention, and failed. Mr. Wilson, well knowing the old adage of Swift, "It is an undoubted truth that no man ever made an idle figure in the world who understood his own talents, and no man ever made a good one who mistook them," confined himself to the terrestrial region of business, and distanced all his competitors.

As a citizen, Mr. Wilson was liberal and progressive. He encouraged public education, was an advocate of religion, and aided all public improvements; in short, he was devoted to the moral, intellectual and material advancement of society. In politics he was what we term an "Old-time Whig." After the manner of Webster, Clay, Wiley P. Mangum, Geo. E. Badger and Wm. A. Graham, he believed in a strong National Government, and the exertion of the powers of that Government, as he understood them, for the benefit of the Nation at large.

He was earnestly opposed to secession, and for the first time in his life was tempted to leave the practice of his profession to engage in political discussion.

Voluntarily, and in opposition to the majority of his friends and relatives, he offered himself as a candidate for the Convention for the purpose of defeating secession. And in this he preferred principle to popularity. For he was not the man to count the number of his adversaries, when a question of principle was involved. He was defeated, as was to be anticipated. But when the State did secede, he seceded with it, and earnestly, loyally supported the cause which she espoused. For from the crown of his head to the sole of his feet, he was a North Carolinian. He freely gave of his substance to the Confederate cause. He knew all the leaders in the secession movement, and many of our generals. He shared the counsels of the one, rejoiced in the temporary victories of the other, and deeply shared in the humiliation of their defeat.

Past the military age, and not being trained to arms, he did not fight

the battles of the Confederacy in person, but he gave to the cause what was dearer to him. He sent his sons to the front; one of whom fought the entire four years without requesting a furlough.

When the cause was lost, and there was a faint hope that his State might be restored to her former place in the Union, without humiliating conditions, he participated in the hope. He was sent as a delegate to the Peace Convention, which, if my knowledge of history serves me right, was called in furtherance of Grant's famous declaration: "Let us have peace." We all now know that this hope failed.

Perhaps in his secret heart he clung to a still further hope that there might arise out of the chaos of parties some political organization through which his old-time tenets of government might find expression. He soon realized the failure of this hope. He saw around him a large number of his trusted fellow-citizens disfranchised and the former slave endowed with the ballot, and in and from such a political situation there was but one issue, that of race supremacy, and he cast his lot on the side of his own race. Believing that Democracy was the only political party by and through which the supremacy of the white race could be sustained, he joined that party, and gave to it loyal support, until his death.

Mr. Wilson was tempted once more to aspire to public office, but that by the almost unanimous solicitation of the white people of his county. He was elected State Senator and was President of the Senate. It is proper to state, in this connection, that he was tendered a judgeship, at one time, but declined it. Political ambition or greed of office could not tempt him from the practice of the profession in which he took delight.

As a man, the principal traits of Mr. Wilson's character were sincerity, justice and perfect courage, moral, mental and physical; nor was there the slightest shadow of false pretense in his conduct. He never made a profession of friendship that he did not feel, nor espouse a cause in whose righteousness he did not believe, and he never betrayed cause or friend. He lived in the broad sunlight of public opinion and his life was an open book.

His justice was manifest in all his dealings with his fellow-man. He gave to every one what belonged to him, and that which was not his own he would neither take nor keep. There was scarcely any one in Mecklenburg and Cabarrus counties who had a legal grievance, whether imaginary or real, who did not consult him. Thus he was the favorite counsel of the plaintiffs, and yet he rejected, if truth were known, more cases than most lawyers brought in his day. He examined the facts laid before him by his client, and without suggestion or amendment thereto, he formed his judgment upon the facts as presented. If he

thought he had no case, he would not bring it. He took cases as he found them and did not make them.

His moral force was shown in his life by his absolute freedom from folly and vice. Immoralities he despised. He seemed to have avoided even the vices of youth. This may have been because, in fact, he had no youth, judging from the precocity of his intellectual development, shown from his early graduation at college and his immediate entrance into the struggles of life. However that may be, if he was tempted as others, he had strength to resist the temptation, and the struggle left behind it no trace upon his conduct. He was bold, self-reliant in mind, forming his convictions without the advice of others, and after having formed them, he freely uttered them, when called upon, and stood ready to defend them against all comers.

Mr. Wilson was a manly man, endowed with the highest quality of physical courage, rightly exercised. This he inherited from his fighting Scotch-Irish ancestry. Suffice it to say that he was of the blood of Andrew Jackson, and none braver ever coursed through the veins of men in all the tides of time.

In this land of equal rights and privileges there is no title of nobility permitted under the Constitution. But nature defies the Constitution, ordinances and statutes, breaks through their bounds, and endows her favorite sons with titles of honor and respect, nobler than those dispensed by royal hands.

Around us we see an aristocracy of mind, of character and of religion. Of that aristocracy Mr. Wilson was a member, and if the title to such nobility can be handed down from sire to son, no man could assert a better right to it, for he was a descendant of a line of Presbyterian ministers, beginning in that Francis McKamie who emigrated to this continent in 1663 and founded and established the first Presbyterian church in America on the far-famed Eastern Shore of Maryland. That church he maintained in spite of religious persecution. Of such an ancestry, Mr. Wilson lived and died worthy.

He entered into the struggles of life early, as I have said, and as its gates spread open to him he saw no primrose path, no vista of easy dalliance, no royal road to success. He knew that his life was to be a battle and a march, and trusted in the end to victory.

He was poor, not with that chill penury which checks noble aim and freezes the genial currents of the soul. Poor after the manner of Webster, Clay, Ruffin and Pearson. Poor with that poverty which is the highest incentive to labor for honorable distinction. He made up his mind in the beginning, that the old adage in reference to lawyers, that they worked hard, lived fast and died poor, should find no additional exemplification in his life.

"He gathered gear by every wile that's justified by honor, not for to

hide it in a hedge, nor for a train attendant, but for the glorious privilege of being independent." Having attained that independence by intense labor before arriving at middle age, he was not lavish in money matters or prodigal of his substance, for he had learned the lesson of frugality in the school of necessity. He was liberal, however, and not parsimonious. He was a contributor to all public charities and to his church. He did his alms in secret, not letting his left hand know what his right hand did. Having attained his independence, in his residence in Charlotte he dispensed a generous hospitality. His home was the home of his friends and relatives, and the door stood wide open to the stranger guest.

In religion he was a Presbyterian. From his birth and training he could scarcely have been anything else; but he was not of the strictest sect of that denomination of Christianity. He was broad-minded and tolerant of the views of those who differed with him on this serious subject.

He knew that the bedrock of our Constitution was religious freedom. Puritan he was, but not after the manner of those Puritans who forbade bear-baiting in England, not because it gave pain to the bear, but because it gave pleasure to the bystanders.

He took delight in seeing others enjoy the pleasures which he had denied himself. Down in his heart of hearts he believed that he might worship God and trust and love his Saviour without condemning all graceful, beautiful, intellectual and innocent pleasures of life.

All this he believed, notwithstanding that he knew that the chief end of man was to glorify God and enjoy him forever.

It was in his home life that Mr. Wilson found his greatest happiness. There his kindly virtues shone resplendent. There was the tender, faithful and knightly husband and just and generous father.

He was twice married. His first wife was Miss Adelaide Patton, of Buncombe County. Of this marriage there were five children, Rosa, James, Harvey, Frank and Anna, four of whom attained ages of maturity, and three lived past the middle age. The first daughter died in infancy.

His second wife was Miss Mary Louisa Phifer, of Cabarrus County. Of her I will only say that she was a lineal descendant of that Martin Phifer who was a member of the first Legislature of North Carolina and an advocate of the first law in favor of religious freedom. Of this marriage there were two children, Mr. George E. Wilson, of Charlotte, and Mrs. Charles E. Johnson, of Raleigh, who still survive.

Of strong, vigorous constitution, sickness rarely visiting him, respected by his fellow-citizens, loved by his friends, adored by his wife and children, conscious of rectitude, confident of immortality, his life was fortunate in duration and exalted in the end.

As has been said of statues and monuments, so may it well be said of portraits as public memorials. Their existence is only justified by two reasons—either as works of art or because of the subject they commemorate. This portrait, tried by either test, stands fully justified.

All who knew Mr. Wilson know this likeness. Here is the thoughtful brow, the aquiline nose, the firm mouth, the strong chin, all the lineaments of a countenance denoting reflection and inflexible resolution.

I therefore present to this Court the portrait of an honored father, the gift of a devoted son. Right well do I understand that you will gladly receive it and direct your marshal to hang it in its proper place in this, North Carolina's only pantheon, surrounded by a goodly company of peers, perhaps encouraging the weary and despairing member of his profession by reminding him of one who hesitated at no labor, whom no difficulties could conquer, and in the lexicon of whose life, both youth and manhood, there was no such word as fail.

ACCEPTANCE BY CHIEF JUSTICE CLARK

The address of Judge Osborne in presenting the portrait of Mr. Wilson is a worthy tribute to the memory of one of the most distinguished lawyers that North Carolina has known. The profession of law differs from nearly all other learned professions in that its members must exercise their calling beneath the critical eyes of their fellows. A physician, a clergyman, a teacher, or a member of any other profession practices his calling chiefly before those who are laymen. But this is not so as to the legal profession. The lawyer is under constant observation by members of his own profession whose interest it is to be quick and alert to find any defect that his argument may present. If there is any joint in his armor they are sure to perceive it and to penetrate it. One who obtains eminence at the bar has always fairly earned it by merit alone.

The judges are not subject to the same sharp and acid test. If a judge is cautious not to stray beyond what has been said, and will confine himself always to the use of the thoughts of other men, he may attain the reputation of a safe and sound judge. But one who climbs to the position of a leader of the bar can only do so upon his own initiative and ability and learning and under the critical eyes of eager and alert antagonists. He must possess a thorough knowledge of the law and quickness to avail himself of all that he knows on the shortest notice. He must have the tact to be insistent with the court without seeming to be persistent. He must be a good judge of men and possess an almost intuitive knowledge of human nature so that he may make the best of the witnesses and win the confidence of the jury in the justice of his cause.

At one time at the English bar the opposing leaders in almost every great cause were Sir James Scarlett, afterwards Lord Abinger; and Henry Brougham, afterwards Lord Chancellor Brougham and Vaux. Brougham had an impressive personality, a deep sonorous voice and immense versatility. Scarlett was a small man, unassuming, and always spoke to the jury in a conversational tone. Indeed, he seemed rather the thirteenth juryman conferring with the others, instead of trying to persuade them. At the close of the term at which many great causes had been tried, Lord Campbell relates that he approached the jury and asked them their opinion of the two men. They were unanimous in the expression that Brougham was probably the greatest lawyer and orator that England had ever known. They said that Scarlett was a very nice gentleman, but every one knew that he was no speaker, and Brougham had always proved that Scarlett did not know much law. Campbell then asked them how it was that at that term in every case in which the two men had been opposed they had given their verdict without exception in favor of Scarlett. "Why," said they, "in every one of those cases he had been employed by those who had justice on their side, and he could not help winning." Campbell thought this the highest art. But the jury were much nearer right than he. The really successful men at the bar, who win most of their causes, are those who have the industry to thoroughly comprehend the facts and the law of every case intrusted to them, with the soundness of judgment to perceive where the right lies and the honesty to advise their clients so that they rarely bring an action, or defend one, in which justice is not on their side. Then they need only the clearness of statement to make the court and jury see it.

Unlike Scarlett, Mr. Wilson was possessed of a fine personality, and was a forceful advocate; but, like Scarlett, he had the industry and the good judgment to see where the justice of the cause lay and the honesty to advise his clients so that he rarely appeared in any cause in which he did not convince the court and the jury that he ought to win, and was much aided in this by his well-known high personal character, which always gave an added force to any argument that he made.

We are fortunate to have before us so excellent a portrait of this great lawyer. His memory as a man and as a lawyer should ever be held in highest honor by our people and the profession. The marshal will hang his portrait in its proper place on the walls of the library of this Court, among those great leaders of the bar whose careers have reflected luster upon the profession to which they belonged and the State that gave them birth. Beneath his portrait may well be written the sentence bestowed by Cicero on a great lawyer of his day, *"Virum justissimum et tenacem"* —*"A most honorable man, and tenacious of the right."*

PRESENTATION OF THE PORTRAIT

OF

CHARLES FREDERICK WARREN

TO THE

SUPREME COURT OF NORTH CAROLINA

BY

HON. STEPHEN C. BRAGAW

1 SEPTEMBER, 1914*

Judge Bragaw said:

Because of the high esteem in which I held him while he lived, and of my deep respect for his memory, now that he is dead, the privilege of presenting his portrait to this Court has been graciously given me by the family of the late Charles Frederick Warren. There are many of his contemporaries—some still engaged in active practice at the bar, and others who add great strength and dignity to the bench of North Carolina—who could speak with more accurate and complete knowledge of his character and career, and more fittingly pay tribute to his memory; lawyers who in the stress of combat have feared and felt his power in opposition, or have leaned on his great strength in association; judges who have profited by his profound learning and exhaustive research and been aided to correct conclusions. But there is none who can speak from a heart more full than mine of kindly thought of him as he returns to us in remembrance today.

Born in the town of Washington, in the county of Beaufort, on 6 September, 1852, Charles F. Warren had but just attained to the full measure of intellectual strength and power, with a future filled with great promise apparently before him, when, on 11 July, 1904, "the pallid messenger with the inverted torch beckoned him to depart."

An unusually useful life ended, a good man gone, a splendid citizen called to his everlasting home, when he had lived but little more than two-thirds of the three score years and ten allotted to man. But what a memory remains! It lives today, after more than ten years have passed, moves men with compelling force and keeps high the standard of morals in the relations of men, wherever its influence touches. No greater commendation can come to a member of the bar of his county than that it be said of him, "He reminds me of Warren."

Charles F. Warren was the son of Judge Edward Jenner Warren, who was born in Vermont, graduated at Dartmouth College, and shortly afterwards moved to Beaufort County, where later he practiced law. He belonged to a distinguished family which produced many eminent

*This address has but recently been furnished.

men who had great part in developing and shaping the destiny of New England.

In mind and personality Judge Edward Warren seemed to typify the strong, stern and rugged State from whose loins he sprang. Of high character, deep purpose, uncompromising will and great intellectual strength, he made lasting impress upon those among whom he "lived and moved and had his being." He soon took high rank in his profession. In 1862 he was elected to the State Senate, and was again a member of the Senate in 1870-'71 and 1872 and its president. In 1866 he was appointed judge of the Superior Court of North Carolina.

The mother of Charles F. Warren was, before marriage, Deborah V. Bonner. She was the daughter of Colonel Richard H. Bonner of Beaufort County, a man of ability and distinguished lineage. The mother survived her son and died in Washington only a few years ago. Another daughter of Colonel Bonner was the mother of Associate Justice George H. Brown, now of the Supreme Court of North Carolina.

The University of his native State at the time offering no opportunity, in 1869 Charles F. Warren was sent to Washington College at Lexington, Va., to the presidency of which the South's beloved chieftain had been called almost from the field of Appomattox. High among the mountains at the head of the Valley of Virginia, for more than half a century this had been the intellectual center of the Scotch-Irish population of the valley, and many of the Nation's strongest men of today were once of its student body. It was not until after the death of General Lee that its name was changed to Washington and Lee University. It was first called Liberty Hall, and later was named after George Washington, who tendered it its first considerable donation.

Mr. Warren graduated from this institution with high honors in 1873, and during all the later years of his life his love for and loyalty to his *Alma Mater* never faltered nor grew cold.

It was while young Warren was a student there that Robert E. Lee died, and it is said that, upon General Lee's desk, among the papers left by him and still undisturbed, preserved intact just as his hands placed them, are examination papers of Charles F. Warren.

It is of interest to note that among his college mates and associates were many who have since taken high rank in the Nation in various fields of usefulness. Among them were James L. Slayden, member of Congress from Texas; George E. Chamberlain, formerly Governor of the State of Oregon, and now one of its United States Senators; Harry St. George Tucker, of Virginia; Thomas Nelson Page, of Virginia, author and Ambassador to Italy; Julius Kruttschnitt, director of maintenance and operation of the Union Pacific and Southern Pacific Railroad systems; Rt. Rev. J. R. Winchester, Bishop of the Diocese of Arkansas;

and Prof. Chas. A. Graves, Professor of Law at the University of Virginia.

After his graduation in 1873, Charles F. Warren returned to Washington, studied law under his father, and was admitted to the bar of North Carolina by the Supreme Court at June Term, 1874, and immediately began the practice of law in Beaufort County. He was at once associated with his father, Judge Warren, the late Colonel David Miller Carter, and William Rodman Myers, under the firm name Warren, Carter, Myers & Warren. Later Colonel Carter moved to Raleigh, Judge Warren and William Rodman Myers died, and Charles F. Warren succeeded to the practice of the firm and continued alone until his death. Among those who recognized and valued merit, ability, integrity, and absolute justice in every relation, he never lost a client.

It is a coincidence that just as now, when his portrait is presented, a Beaufort County lawyer is one of the Supreme Court justices of this State, so when young Warren applied for admission to the bar in 1874, Judge William Blount Rodman, a distinguished lawyer of the Beaufort County bar, was an honored member of the Supreme Court as then constituted.

In 1879 Mr. Warren married Elizabeth Mutter Blount, daughter of Major John Gray Blount, of the family referred to by the late Governor Henry T. Clark, who is quoted in Wheeler's "Reminiscences" as expressing the opinion that "No family whose name now survives in the State can trace its origin back to a period so remote in the history of North Carolina."

Surviving Mr. Warren were his widow, his mother, an only sister, Mrs. Lucy Warren Myers, widow of William Rodman Myers, now living in Washington, this State, two sons and two daughters. The elder son, Frederick B. Warren, of New York, is a successful journalist connected with the Hearst papers, and said to rank, on the general staff, second only to Arthur Brisbane. The younger son, Lindsay C. Warren, of Washington, N. C., is a successful lawyer of great promise, possessing many of the qualities and characteristics of his distinguished father. He is a member of the firm of Daniel, Warren, Manning & Kitchin.

Charles F. Warren was but a boy when this country writhed in the mighty throes of Civil War. He would have made a magnificent soldier. No man ever lived who knew less of the sensation of fear. He was the bravest man I ever knew. When one of his officers asked Napoleon's greatest soldier, Marshal Ney, if he never felt fear, Ney replied: "I never had time." If Warren had been asked the question, he could have truthfully answered, "I do not know its meaning." He gloried in a fight. Whether from his association with the greatest war captain of all time, during the days he sat at the feet of Robert E. Lee, he imbibed

a love of things military, or whether he inherited the instinct from his ancestors of New England or his Southern forebears, one cannot know; but the militant spirit was strong within him. It is doubtful whether the State had a more thorough student of the history of the period from 1861 to 1865, or one more accurately and fully informed, other than those who took part in the great conflict.

Mr. Warren was profoundly interested in politics and was not without political ambition; but it was an ambition based upon the earnest desire to be of service to his State, and not the selfish yielding to the lure of office from the mere sordid lust for office. The term "politician," in its modern acceptation, had no application to him. He could not dissemble, and had supreme contempt for political duplicity and the doctrine of political expediency. He formed and expressed his opinions of men and measures without thought of the effect of such expressions upon himself. He was mayor of Washington for five years from 1881 to 1886. In 1886 he was elected to the State Senate, where he took first rank with the ablest lawyers and statesmen in that body.

It is my impression that he introduced the bill, or was chiefly instrumental in procuring the enactment into law of what is now section 614 of the Revisal of 1905, providing that whenever any civil action or special proceeding begun before the clerk shall be, for any ground whatever, sent to the Superior Court before the judge, the judge shall have jurisdiction, and shall, upon request of either party, hear and determine all matters in controversy in such action, unless it shall appear to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so.

In 1896 Mr. Warren was a delegate to the National Democratic Convention held at Chicago, at which William J. Bryan was nominated as the party candidate for the presidency. His enthusiasm in describing the stirring scenes of that memorable gathering was unbounded. In 1898 the opportunity was given to him to accept the nomination for Congress from the First Congressional District, the Hon. John H. Small having declined to permit the use of his name until after the nomination had been tendered to Mr. Warren and by him refused.

In 1899 he was unanimously elected President of the North Carolina Bar Association, being the second president of that organization, succeeding Hon. Platt D. Walker, now associate justice of the Supreme Court of North Carolina, who was the first president of the State Bar Association. Mr. Warren's administration of this high office was eminently satisfactory, and aided in strengthening the influence of the association for more progressive methods and higher ideals. To his interest, zeal and admirable address as president in 1900 should be attributed the requests made by the Bar Association to the Supreme Court for a

restoration of the requirement that a two years course of study be a condition upon applicants for license to practice law in the State, and that Sharswood's "Legal Ethics" be added to the course of study. It is gratifying to recall that both requests were promptly granted by the Supreme Court. Your speaker recalls that previously he had prepared and procured the adoption by the local bar of Beaufort County of a condensed Code of Ethics applicable to the members of that bar.

His address as President of the North Carolina Bar Association in 1900 was on the subject, "The Standard of Admission and Legal Ethics," and those who heard, or have read it, agree that no stronger appeal was ever made in a worthy cause. To those who knew Charles F. Warren it is manifest that he wrote and spoke as he practiced; that he was expressing in precept the faith that he expressed in daily work and living.

For several years preceding his death he suffered, intensely at times, from an incurable malady which ultimately proved fatal; but with a courage and devotion that no Roman centurion ever surpassed, and with the fortitude of an ideal martyr, he sat at his desk day after day and far into the night guarding the interests of his clients, and ceased from labor only when the stricken and weary body could no longer respond to the strong and ever ready will. In the great battles of war, when a soldier falls, another takes his place and the gap is closed. When Warren fell, among all the worthy ones left there was none to take his place; and it is no disparagement of my brethren to say, the vacancy created when Charles F. Warren was called remains today unfilled.

As briefly as possible, and I trust without tax upon your patience, I have traced the bare outlines of the life of this strong man. The proprieties of the occasion do not admit of more. You who knew him know how inadequate is human language for appropriate tribute to him.

Charles F. Warren was a great lawyer. All size is relative. The true measure of a man and lawyer is taken by comparison with his associates and contemporaries. Warren, in the activities of professional life, stood by the side of or before Judge W. B. Rodman, Colonel David Miller Carter, Hon. James E. Shepherd, who later became Chief Justice of North Carolina, Hon. George H. Brown, now a member of this Court. He met in combat and in conference Major Lewis Latham, Governor Jarvis, Thomas G. Skinner, James Edwin Moore, W. D. Pruden. And measured by these men of great height, he was known among them and in comparison with them as a great lawyer and a strong man.

He was cautious and safe in counsel, giving no opinion not fortified by authority searched for and found. Earnest, forceful and convincing as a jury advocate; always frank and respectful to the court, but unyielding and fearless in demanding due consideration for himself and

his cause by the court; bold in presenting and plausible in maintaining his side of a debated and debatable question; quick at courthouse repartee, and a past-master in the art of direct and cross-examination, he was without a superior, within my observation, in the *nisi prius* court. Yet nothing contributed more to his success in the trial of causes, with all his skill and ability, than his fixed habit of thoroughness in preparation. He left nothing to the element of chance or luck. He hunted for the weak points of his own case with pitiless thoroughness and prepared the case of his adversary as though it were his own. To investigate and master the two sides of a controversy thus, and yet to remain the partisan advocate, with keenness and zeal and courage unabated, requires a mental fiber and a moral temper precisely as rare as real greatness.

In the appellate court this habit of thoroughness was again apparent. He never concluded and completed the preparation of his case till further preparation could no longer avail. The call of his case for argument in this Court usually interrupted his continued search for authority to sustain him.

His energy and zeal in a cause depended in not the slightest degree upon the personality or position of his client. The humblest negro became the biggest man in the land to Warren when that negro's case was in his care. The strongest storms of public clamor against his client swayed him not the slightest nor caused him to abate one jot or one tittle in the defense of his cause. When the Prince of Wales had pleaded with Lord Erskine to decline to defend Tom Paine, and public opinion desired Paine's destruction, Erskine declared: "From the moment that any advocate can be permitted to say that he will not stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end." This was Warren's view. On the other hand, no man, nor combination of men, could ever control him or cause him to swerve from the course his conscience directed.

He was absolutely honest with himself, his neighbor and his God, and no man ever had a higher sense of honor. It never occurred to any who knew him to question his word or his complete fidelity to every trust. His final account required no auditing. In one respect he was weak in discernment. He could not see a fault in a friend, nor believe an unworthy thing of one whom he trusted. He was intemperate in loyalty to friend and client and cause espoused. He faced foe with the spirit and courage of a lion, but by the side of a friend he was as Jonathan to David. A striking illustration of his loyalty came under my observation as he sat through the weary hours of an intensely hot summer night and till long after the break of dawn in a convention at Greensboro in the interest of an old friend, without hope of success, held only by the

sense of loyalty, suffering acutely, too weak to walk, conscious even then that the night of his life was near and its shadows falling upon him, yet taking no thought of self.

In 1901, in his admirable address as President of the North Carolina Bar Association, Hon. Charles M. Stedman, describing the "Model Lawyer," said: "The simplicity of his character commands confidence. He loves the companionship of friends. He delights in the society of books. A pure and irreproachable private life places him above the shaft of petty gossip. He is free from any taint of malice, envy or falsehood. He is brave and chivalrous, always respectful to, but never obsequious to the judge. His clients confide to him their troubles with a confidence that he will not reveal them. He is fearless when combatting for his client the whole weight of an irresistible clamor. He is cool, though tried by all the means which could overcome the firmest patience. He is cautious when prudence counsels reserve. He is aggressive when the moment for action has arrived. The love of gain does not tempt him. He is learned in the law; well versed not only in its technicalities, but in its broad and deep principles. He manifests and feels a strong interest in all that affects the welfare of the community. In advancing his client's interest he spares no labor, but is governed by a supreme sense of duty. He has an absolute scorn for every artifice or trick by which an undue advantage might be gained. He fights his battles in the open field." It is said that later a number of prominent lawyers of wide acquaintance among the members of the bar of this State were discussing this address and the question arose as to what lawyer then living the description would most accurately fit. I have heard that it was agreed that none came nearer to the realization of this ideal than Charles F. Warren. From an intimate knowledge and close observation of him, it is my deliberate judgment that every sentence in that description fits Charles F. Warren, the lawyer, without exaggeration.

A description which fits him as a man so strikingly that one could almost believe the writer knew him and had him in mind as he penned the lines, are the words of Dr. J. G. Holland:

> "Men whom the lust of office does not kill;
> Men whom the spoils of office cannot buy;
> Men who possess opinions and a will;
> Men who have honor and who will not lie:
> Men who can stand before a demagogue
> And damn his treacherous flatteries without winking.
> Tall men, sun-crowned, who live above the fog
> In public duty and in private thinking."

Such a lawyer and such a man was Charles F. Warren. In his death our profession and the State sustained immeasurable loss. All too soon

he died. "The broken shaft stands by the wayside—from the base to the point of cleavage the chiseling is that of a master hand, and the size and the perfect workmanship tells to the passer-by how tall and beautiful it would have been if the years had been bidden to place the crown and capital upon the completed column."

I present this portrait to the Court. It is eminently proper that it hang in the gallery of North Carolina's great men and great lawyers. It is well that those who knew him may have the opportunity to gaze upon the semblance of his features and be reminded of his high character and honorable career to their benefit, and that others who knew him not may learn of him and how he lived, as lawyer and man, and profit by the learning.

ACCEPTANCE BY CHIEF JUSTICE CLARK

Judge Edward J. Warren was one of the most forceful and able men that this State has produced. His son, Charles F. Warren, lived scarcely past his meridian, but he inherited his father's ability, and though he did not live long enough to render the full measure of service to his State and people of which he was capable, he lived long enough to establish his own fame and to entitle him to an acknowledged place among the leaders of the bar of North Carolina.

It is well that these memorials of the great lawyers of the State should be placed by the bar on the walls of this building. No men exert a wider influence, or command more ready respect, than the leading lawyers among a free people. They are not only usually the leaders of the people on great political occasions, but they formulate in their studies, and hammer out on the anvil of debate the great thoughts which, when adopted by the courts, after due consideration, shape the judicial history of a people and decide their economic status and the progress or otherwise in the betterment of the condition of the masses. Yet, unless these great lawyers should happen to fill some official position by which their names become recorded as a part of the history of the State, their memory is soon forgotten and passes away. No matter how much they have contributed to shape judicial decisions, there is nothing on record.

As Chief Justice Crewe of England, in passing upon the great peerage case of De Vere, said, in regard to the fleeting fame of the great feudal families, "Where is Bohun? Where is Mowbray? Where is Mortimer? Nay, which is more and most of all, where is Plantagenet? They are entombed in the urns and sepulchres of mortality!" So we may well say, Where are the names of the great lawyers who, failing, or not choosing to fill, official positions, yet once shaped legislation, the course

of judicial decisions and political events by their eloquence, their force of thought and their personal popularity? Who remembers now these giants of the past, these intellects which shaped events and made the history of North Carolina? Who remembers the great occasions when by their eloquence in the forum, or on the hustings, they stemmed or changed the tide of thought and action and altered the course of events? Who can recall even the names of these great men of days gone by? All thought and memory of them "melts like a fleecy cloud on the infinite azure of the past."

It is just, it is appropriate, therefore, in gratitude, to preserve the portraits of these men who did so much for the people among whom they lived, who stood for the advancement of justice and ever held high the best traditions of the bar.

We welcome to these walls the portrait of the distinguished lawyer which has been so handsomely presented by Judge Bragaw, and the marshal will hang it in its appropriate place among his peers as a worthy tribute to one who served well and ably his State and its people.

PRESENTATION OF PORTRAIT

OF

COLONEL JAMES T. MOREHEAD

TO THE

SUPREME COURT OF NORTH CAROLINA

BY

HON. ROBERT C. STRUDWICK

2 NOVEMBER, 1915

May it please your Honors:

The bar of Guilford County has conferred upon me the honor of presenting to this Court the portrait of Colonel James T. Morehead, its oldest and most distinguished member.

The name Morehead is a household word in North Carolina, and for years many members of this family have been among the most useful and eminent citizens of this Commonwealth, serving their State with conspicuous ability and unselfish devotion, both in peace and in war. Among its sons it has numbered statesmen, lawyers and financiers whose careers have reflected honor upon the State and whose names will not be forgotten as long as its history endures.

Colonel James T. Morehead was born in Guilford County, North Carolina, the son of the Honorable James T. Morehead and of his wife, Mary Lindsay Morehead. His father was a brother of Governor John M. Morehead, and was one of the leading lawyers of his day, practicing his profession in Guilford and all the adjoining counties. The frequency with which his name appears in the reports of this Court from 1830 up to the time of his death bears witness to his eminence as a lawyer and the importance of the litigation in which he was employed. He represented his district in Congress in 1850, declining reëlection in order to devote himself exclusively to the practice of his profession.

Colonel Morehead received his primary education in the schools of his native county and at the school of Dr. Alexander Wilson, at Melville, Alamance County. He entered the University of North Carolina and was graduated therefrom at the age of twenty with the class of 1858. He was one of the four first-honor men of his class. He then entered the law school of Chief Justice Pearson at Richmond Hill, Yadkin County, where, amid primitive surroundings and without any of the equipment of the modern law school, that great lawyer and teacher, with unequaled force, terseness and clarity of expression, indelibly impressed upon the minds of his pupils the great underlying principles of law and of equity.

Colonel Morehead, upon an examination by the Supreme Court, then consisting of Chief Justice Pearson and Associate Justice Thomas Ruffin (formerly Chief Justice) and W. H. Battle, was licensed, in 1859, to practice before the old county courts, and one year thereafter, which was as early as such license could be applied for, he was duly licensed by that court to practice in all the courts of the State. Associate Justice Ruffin had, in the interval, been succeeded upon this bench by the Honorable Matthias E. Manly.

He had been engaged but a short time in the practice of his profession when the storm of Civil War burst upon the country. In April, 1861, he was a member of the Guilford Grays, a company composed almost entirely of young men born and reared in Greensboro and in the surrounding country. He was elected lieutenant in that company, which, under the orders of Governor Ellis, was sent to Fort Macon, N. C., in April, 1861, and subsequently, when the ordinance of secession had been passed, it became a part of the army of the Confederate States, officially designated as Company B, Twenty-seventh Regiment. Colonel Morehead served with distinction and gallantry throughout the entire war. He rose through successive grades to the colonelcy of the Fifty-third Regiment. He was present in every battle in which his command was engaged but one, when he was in a hospital suffering from wounds received at the front. He was at Gettysburg and was with General Early in 1864, when that dashing commander led his troops within sight of Washington City and for a time seriously menaced the National Capital, and he was with that general in his subsequent campaign in the Valley of Virginia.

As soon as the courts were opened after the war Colonel Morehead resumed the practice of his profession. He regularly attended the courts of every county adjoining Guilford, and was among the last of the lawyers who followed this custom. He did a leading practice in all these counties. The dockets of Rockingham, Alamance, Randolph, Forsyth and Stokes attest the extent of his business and the high estimation in which his services are held by litigants. Endowed by nature with a logical and analytical mind, he seeks for and rarely fails to find, the leading, governing principle of law involved in a case in which he is engaged, and, when found, he elucidates it with rare force and clearness, both to the court and to the jury. Never what is known as a case lawyer, he is strong upon the facts and the basic principles of law and equity applicable to them. Few men have ever appeared at the bar in North Carolina who are so effective as he in the argument of questions of fact to petit juries. He knows men, he knows human nature, and he always knows the facts of his case, and he applies that knowledge in a way that juries find it hard to resist. With wit, humor, pathos and

cogent reasoning at command, his appeals to the feelings and intelligence of juries have turned the scales in many a hard-fought battle and won many a seemingly doubtful case. In addressing juries he often disregards mere correctness of expression and, using the forcible and homely language of the man in the street and of the man between the plow-handles, he drives home upon the minds and consciences of his "little twelvers" (as Erskine used to call them) his convictions of what their verdict ought to be. And generally it is as he desires.

Colonel Morehead is one of the three or four lawyers at the bar who commenced to practice under the old system and who are familiar with our courts and our practice as it existed before 1868, when the Code of Civil Procedure was adopted. These men form an interesting and notable link between the practice as we know it and as it was known to a former generation. He has appeared before every judge of the Supreme Court who has been upon the bench since the war; before every judge of the Federal Court in this State who has sat upon that bench since 1866, except the late Judge Purnell, of the Eastern District, and he has never failed to secure and retain the friendship and esteem of every judge before whom he has appeared. He has been called on to appear in important cases in the Circuit Court of Appeals in Richmond, and in the State courts of Virginia and of New Jersey.

In 1866 Colonel Morhead represented Guilford County in the last House of Commons of North Carolina and, while a member of that body, he introduced the bill which became a law restoring to married women their common-law right of dower. He represented his district in the State Senate in 1872, 1874 and 1883. In 1872 he was elected President of the Senate upon the accession of Lieutenant-Governor Tod R. Caldwell to the governorship, made vacant by the impeachment of Governor W. W. Holden.

Colonel Morehead has won distinction as a soldier, as a lawyer, and as a legislator, but his greatest achievement has been the conquest he has made over the hearts of his fellow-men. He has ever been kind and considerate to the younger members of the profession, courteous to the court and to all his brethren at the bar. No man has ever heard him say a harsh or unkind word about any human being, or has known him to do an unkind or ungenerous act. In the practice of his profession he has always been fair, scrupulous in the observance of every promise and engagement, disdaining to avail himself of any unfair advantage under any circumstances. His kindliness, his courtesy, his consideration for the feelings and interests of others have enshrined him in the hearts of all who know him.

"And thus he bears without abuse,
The grand old name of gentleman,
Defamed by every charlatan,
And soiled with all ignoble use."

His ability as a lawyer and as an advocate, his purity, kindliness and sterling worth as a man, make it fitting that his portrait should hang upon the walls of this building in company with those famous judges and lawyers whose faces, now looking down upon the scenes enacted here, admonish us to walk worthy of our high vocation.

ACCEPTANCE BY CHIEF JUSTICE CLARK

Greensboro has always had a strong and able bar. We are glad to receive at its hands this portrait of one of its most distinguished and ablest members. He is one of the very few men now living who received his commission to hold a brief in the courts before the outbreak of the great Civil War. A brave soldier, a learned lawyer, an honorable gentleman and a member of one of the most distinguished families in the State, he has been a man among men, a lawyer among lawyers.

The friends and comrades who began the march of life with him have been scattered like leaves in wintry weather. He has ever recognized what was due to our great profession and has held high and clear its standards at all times. His career has not only been honorable to himself, but has reflected luster upon the profession, his county and his State, and the illustrious name that he bears.

The marshal will hang the portrait in its proper place among the great lawyers whose memory will be held in honor for all time by the people and the bar of North Carolina.

INDEX

NOTE.—The reverse index will be found to embrace the distinctive subheads of the decided points, referring by number to the places where the decisions thereon are indicated, and the cases embracing them are cited. It is hoped that in this manner, and by the embodying of the sketch words in *italics* in this index, the practitioner may more readily find whether the point he is looking up has been decided in this volume, and, if so, where.

ACCEPTANCE. See Deeds, 39.

ACCOUNTING. See Limitations of Actions, 2; Evidence, 11; Logs and Logging, 2.

ACCOUNTS. See Vendor and Purchaser, 14.

ACTIONS. See Tenants in Common, 1; Deeds, 4.

ADULTERY.

1. *Criminal Law—Fornication and Adultery.*—Connected and relevant circumstances leading up to and tending to show the guilt of the parties charged with fornication and adultery are competent to be submitted to the jury as evidence of the offense charged, as where a married man does not provide for his wife and children or live with them, but lives with an unmarried woman on his own lands, eats with her, works in the field with her, illegitimate children are born to her under such circumstances, who call the man their father. *State v. Wade*, 306.
2. *Same—Two Years—Former Relations—Evidence.*—The fact of fornication and adultery of the parties charged with this crime may only be shown within two years before the issuance of the warrant, but improper relations of this character theretofore existing is competent evidence as explanatory of their continued relationship within that period. *Ibid.*
3. *Same — Fornication and Adultery — Existing Marriage — Evidence.*—Upon a trial for the criminal offense of fornication and adultery, it is competent to show that the husband had a living wife from whom he had been divorced, as bearing upon the charge in the indictment that the defendants were not married to each other. *Ibid.*

ADMISSIONS. See Appeal and Error, 45, 46; Trials, 14.

ADVERSE POSSESSION. See Judicial Sales, 2; Limitation of Actions.

AFFIDAVITS. See Statutes, 10, 11.

AFFRAY.

1. *Criminal Law—Indictment—Affray—Abusive Language.*—One who by the use of such abusive language or offensive conduct towards another as is calculated and intended to bring on a fight is guilty of an affray, although he did not return the blow given him in consequence; and an indictment charging, among other things, that one of the defendants used language to the other calculated to bring on a fight, and that the fight ensued, and that they "did mutually beat and assault each other," sufficiently charges an affray. *State v. Lancaster*, 284.

AFFRAY—*Continued.*

2. *Criminal Law—Indictment—Affray—Place.*—In an indictment for an affray it is unnecessary to charge or prove the place where the offense is charged to have been committed. The form of the indictment in this case is held sufficient. Revisal, secs. 3254, 3255. *Ibid.*

3. *Criminal Law—Affray—Deadly Weapon—Superior Court—Jurisdiction.*—The Superior Court has jurisdiction of an affray when only one of the parties engaged therein uses a deadly weapon. *Ibid.*

4. *Criminal Law—Affray—Superior Court—Motion to Quash—Justice's Court—Defenses.*—One indicted in a justice's court for an affray without the use of a deadly weapon, who has therein been convicted or acquitted, may show it as a full defense, upon trial under an indictment originating in the Superior Court; but this position is not available in the latter court on a motion to quash. *Ibid.*

AGREEMENT. See Appeal and Error, 31.

AMBIGUITY. See Deeds, 41.

AMENDMENTS. See Appeal and Error, 17; Indictment, 3; Railroads, 2; Mechanics' Liens, 1; Pleadings; Courts, 14.

ANSWERS. See Evidence, 4.

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APPEAL AND ERROR. See Judgments, 13; Carriers of Passengers, 5; Corporations, 9; Constitutional Law, 2; Courts, 7; Homicide, 3, 9; Principal and Agent, 3; Reference, 1; Statutes, 3; Trials, 3, 10, 18; Vendor and Purchaser, 2; New Trials, 1; Pleadings, 11; Mechanics' Liens, 2; Evidence, 6, 7; Damages, 1.

1. *Courts — Intimation of Opinion — Instructions — Appeal and Error—Trials.*—When the trial judge intimates during the trial of a case that he will peremptorily instruct the jury to answer the controlling issue in favor of a party, upon the evidence, rendering it unavailing for the opposing party to further develop his case, he, in deference to the ruling of the court, may refrain from doing so, and appeal from the judgment accordingly rendered. *R. R. v. Way*, 1.

2. *Courts—Intimation of Opinion—Instructions—Appeal and Error—New Trial—Scope of Inquiry—Evidence.*—In a proceeding to protest an entry under the provisions of Revisal, sec. 1696, the trial judge erroneously holding that the former entry of the protestant conferred an absolute and indefeasible title to lands under navigable water to the deep-water margin, and judgment having been accordingly rendered and appealed from by the enterer without full development of the case, the judgment will be set aside on appeal, leaving open to the parties to show, if they can do so, other matters affecting the title, which are relevant and available to them. *Ibid.*

3. *Instructions—Unrelated Phases—Appeal and Error—Harmless Error.* Where the action is to recover upon a contract of sale of merchandise, and the issue is made to depend upon whether the plaintiff failed in his duty to properly prepare the merchandise for shipment (in this case bananas), an instruction clear and explicit upon the issue, but obscure upon an irrelevant and unrelated phase of the evidence, is harmless error. *Fruit Distributors v. Foster*, 39.

APPEAL AND ERROR—*Continued.*

4. *Appeal and Error — Assignments of Error — Oral Agreement.*—Oral agreements in the Supreme Court upon matters neither embraced in the assignments of error nor referred to in the printed brief will not be considered. *Mitchem v. Mitchem*, 48.

5. *Witnesses — Experts — Hypothetical Questions — Appeal and Error—Harmless Error.*—The questions asked expert witnesses in this case, supported by the evidence, are held proper; but if otherwise, the error was committed in appellant's favor, of which it cannot complain. *Cochran v. Mills Co.*, 58.

6. *Appeal and Error—Reference—Findings.*—The findings of a referee, confirmed by the judge, will not be disturbed on appeal when there is evidence to support the findings. *Lumber Co. v. Lumber Co.*, 81.

7. *Evidence—Boundaries—Appeal and Error—Harmless Error.—Held*, in this case, that certain testimony of a witness as to line trees upon a boundary of lands in dispute was not sufficiently definite; and were it otherwise, its exclusion would not be reversible error. *Ibid.*

8. *Court's Discretion—New Trials—Newly Discovered Evidence—Appeal and Error.*—The refusal of the trial judge to grant a new trial for newly discovered evidence is a matter within his discretion and not ordinarily reviewable on appeal. *Horton v. R. R.*, 108.

9. *Appeal and Error—Objections and Exceptions—Harmless Error.*—The introduction of inadmissible evidence is rendered harmless when other evidence of the same character has been introduced on the trial without objection. *Spencer v. Bynum*, 119.

10. *Same—Contracts—Issues—Instructions—Appeal and Error—Harmless Error.*—Where a passenger is misled in buying a ticket to his destination by the assurance of the local ticket agent of a railroad company into believing that he could go by a certain route, when his ticket specified by another and shorter one, and in consequence, upon refusing to pay upon the train the difference in the mileage in money, he is ejected from the train, and in addition to a favorable finding upon this issue the jury have found that the local agent had contracted with the plaintiff that he could take the longer route if he failed to make connection on the shorter one, but from the other issues, under a correct instruction, it appears that the case turned solely upon the question of the plaintiff having been misled, the questions of the authority of the local agent to make the contract, or of unlawful discrimination, become immaterial, and will not be held for reversible error. *Hallman v. R. R.*, 127.

11. *Appeal and Error—Evidence—Competent in Part—Objections and Exceptions—Trials.*—Where objection is made that the answers of witnesses have taken too broad a range, and some of the testimony is competent, the objection should be made to the incompetent matter, specifying it, and not to the answer as a whole. *R. R. v. Manufacturing Co.*, 157.

12. *Appeal and Error—Questions and Answers—Objection and Exception.* Errors assigned to ruling out questions asked a witness will not be considered on appeal unless the relevancy or materiality of the expected answers are made to appear. *Lynch v. Veneer Co.*, 168.

13. *Judgments, Set Aside—Meritorious Defense—Excusable Neglect—Findings—Appeal and Error.*—A judgment by default of an answer should not be set aside unless it appears that the defendant has a meritorious

APPEAL AND ERROR—*Continued.*

or valid defense and excusable neglect is shown by him; and the findings of fact thereon by the trial judge is conclusive on appeal. *Hyatt v. Clark*, 178.

14. *Instructions, Contradictory — Appeal and Error — Harmless Error—Trials.*—An erroneous instruction is not rendered harmless by another and correct instruction upon the same phase of the case, unless the former has been retracted or by a proper explanation the wrong impression made thereby has been eliminated from the minds of the jury. *Raines v. R. R.*, 190.

15. *Trials—Issues of Fact—Appeal and Error.*—The controversy in this case was over the title to a tract of land, depending upon the location of a certain boundary line, with evidence tending to support the contention of both parties, and it is held that the issue presented exclusively a question of fact, submitted under a correct charge of the court, and no error is found on appeal. *Pearce v. Waters*, 240.

16. *Appeal and Error—Assignments of Error—Rules of the Supreme Court—Motions—Appeal Dismissed.*—Assignments of error which only group the exceptions, as, "Group 1 includes the first assignment," etc., give no indication of the error complained of, and are far from being a compliance with the rule, and will be dismissed under Rule 19, subsec. 2. The Court on this appeal, for reasons stated, refused to grant appellant's motion to consider additional assignments filed. *Merritt v. Dick*, 244.

17. *Pleadings — Amendments — Court's Discretion — Appeal and Error.*—Error assigned on appeal to the order of the trial judge permitting, in his discretion, a defendant to file an amended answer will not be considered on appeal when there is nothing to indicate that he had abused this discretionary power. *Ibid.*

18. *Appeal and Error—Objections and Exceptions—Evidence—Judgments.* When on appeal from judgment allowing alimony *pendente lite* in an action for divorce *a mensa*, etc., the judgment alone is excepted to, it will not raise the question of the sufficiency of supporting affidavits or the findings thereon, it being required that appellant assign error by pointing out the particular finding he claims is not supported by the evidence. *Mowery v. Mowery*, 248.

19. *Appeal and Error—Exceptions Withdrawn—Judgments—Presumptions.* When the appellant withdraws his exceptions to the evidence, and none are taken to the judge's charge to the jury, it will be assumed by the Supreme Court that the findings of the jury are correct; and under the issues answered in this case the judgment of the trial court thereon, alone excepted to, is affirmed. *Burris v. Burris*, 247.

20. *Appeal and Error—Instructions—Negligence—Harmless Error.*—In an action to recover for an alleged negligent injury to plaintiff, while driving on the streets of a town, by the defendant while running an automobile, the plaintiff on cross-examination testified that defendant gave him $5 in money, carried him to his home and appeared to be solicitous of him. The court refused to charge, at defendant's request, this evidence should not be considered on the issue of negligence, and it is held that no prejudice to defendant has been shown, and the refusal of the request was not reversible error. *Anthony v. Poag*, 250.

APPEAL AND ERROR—*Continued.*

21. *Appeal and Error—Matters of Fact.*—This action seeking to recover damages for wrongfully detaining the plaintiff's mules, involves largely matters of fact, with instructions following the rulings on a former appeal, and no error is found. *Robinson v. Huffstetler*, 252.

22. *Appeal and Error—Case on Appeal—Interpretation of Statutes—Motions—Case Stricken Out—Judgments.*—A paper-writing purporting to be a case on appeal will be stricken out and the judgment below affirmed when not sufficiently made out in compliance with Revisal, sec. 591; and a mere outline of the case incorporating instructions to the clerk to fill in certain portions of the evidence stenographically taken and transcribed, the charge of the court, etc., is not a sufficient compliance with the statute, it being the duty of the appellant to make out his case and fully perfect it before serving it upon the appellee, and no part of the duty of the clerk to do so. *Sloan v. Assurance Society*, 257.

23. *Appeal and Error—Evidence—Harmless Error.*—Incompetent declarations admitted in evidence as to the correctness of items of an account in controversy are harmless when the items referred to are not disputed. *Huffman v. Lumber Co.*, 259.

24. *Appeal and Error—Criminal Law—State's Appeal—Statutes.*—An appeal will lie on behalf of the State from an order quashing a bill of indictment. Revisal, 3276 (3). *State v. Lancaster*, 284.

25. *Appeal and Error—Evidence—Inferences—Homicide.*—On appeal by defendant charged with homicide, and convicted of murder in the second degree, the exclusion by the judge of the defense of manslaughter entitles the appellant to the benefit of every inference that the jury could have reasonably and fairly drawn from the evidence in his favor on that phase of the case. *State v. Kennedy*, 288.

26. *Appeal and Error—Defendant's Appeal—Adverse Judgment.*—No appeal lies for defendant in a criminal case except from a judgment on conviction, etc., and final in its nature, and in this case the appeal of defendant is dismissed without prejudice to its rights to have its position considered and its rights made available by proper appellate procedure on the entry of judgment below. *State v. R. R.*, 297.

27. *Appeal and Error—Trials—Broadside Exceptions—Instructions—Special Requests.*—A general exception to the charge of the judge to the jury, without particularizing the errors complained of, will not be considered on appeal; and where the exception is to the failure of the trial judge to instruct more fully, in his general charge, upon certain phases of the evidence in the case, it can only be made available when special and proper requests were tendered in time and refused by the court. *State v. Wade*, 306.

28. *Same—Courts—Findings—Appeal and Error.*—Where sentence in a criminal action has been suspended during "good behavior," and thereafter judgment is pronounced, the findings of the trial judge in relation thereto are not reviewable on appeal. *State v. Johnson*, 311.

29. *Jurors — Homicide — Segregation—Appeal and Error—Court's Discretion.*—It is not a statutory requirement that jurors should be kept together during the trial of a case, but a practice of the court to prevent their being tampered with, which should be given a reasonable construction; and where it appears on appeal from the refusal of the trial judge to grant a new trial on that ground, and from the find-

APPEAL AND ERROR—*Continued.*

ings of the judge, that a jury in a homicide case had been permitted during the trial to sleep in adjoining rooms at a hotel, segregated from the other guests of the hotel, but they communicated with no one except to ask the bell-boy for ice water; and the defendant was in no wise prejudiced, it is held that the action of the judge was within his reasonable discretion, and not reviewable. *State v. Trull*, 363.

30. *New Trial—Court's Discretion — Appeal and Error — Findings.*—The findings of the trial judge upon a motion before him for a new trial upon newly discovered evidence, and his refusal of the motion, are not reviewable on appeal. *Ibid.*

31. *Appeal and Error—Docketing Appeals—Agreements—Procedure.*—The statute and rules of the Court requiring docketing appeals in the Supreme Court before the call of the districts to which they belong, etc., under penalty of dismissal (Rules 5 and 7, Revisal, sec. 591), may not be varied, either in criminal or civil cases, under agreement with the solicitor or opposing counsel to extend time to the appellant later than that allowed; and when these requirements for any reason cannot be complied with, the appellant must docket the record proper in the Supreme Court, and apply to the Court for a *certiorari*. *Ibid.*

32. *Witnesses—Mental Capacity—Findings of Judge—Appeal and Error—Weight of Evidence—Questions for Jury.*—A finding by the trial judge upon the examination of a witness that he is qualified as to mental capacity to testify is not reviewable on appeal, the weight of the testimony being for the jury. *State v. Tate*, 373.

33. *Appeal and Error—Jurisdiction—Oral Motions—Supreme Court—Appellant's Brief.*—Oral motion to dismiss for want of jurisdiction in the inferior court may be made for the first time in the Supreme Court on appeal; but it is suggested that it would be but just to the opposing party for appellant to take this position in his brief. *Ibid.*

34. *Constitutional Law—Trial by Jury — Appeal — Superior Court.*—The constitutional guarantee of a trial by jury is not violated in a police court for the trial of misdemeanors, where there can be no sentence imposed of imprisonment in the State's Prison or of death, and this right is preserved by right of appeal to the Superior Court. *Ibid.*

35. *Same—Appeal and Error—Injunction — Findings of Facts — Supreme Court.*—It appearing from the record on appeal, in this action to restrain a municipality from issuing bonds in order to acquire a waterworks plant, that the result of an election held for the purpose of voting on the question would not be affected by the failure of the officers to give certain full notice of places of registration, and that the election was fair, offering full opportunity to the people for voting, the order of the lower court, continuing a previous order restraining the issuance of the bonds, is reversed, and the injunction dissolved, though the lower court failed to find the facts stated, this Court exercising its right to do so. *Hill v. Skinner*, 405.

36. *Appeal and Error—Interlocutory Orders.*—As to whether an appeal will lie from the interlocutory order rendered in this case, *quere*. The Court, however, decides the matter presented. *Best v. Best*, 161 N. C., 513. *Barnes v. Fort*, 431.

37. *Judgment—Nonsuit—Evidence—How Considered—Appeal and Error.* Where a judgment of nonsuit upon the evidence is rendered, every

APPEAL AND ERROR—*Continued.*

fact essential to the plaintiff's cause of action, which it tends to prove, must be taken as established and construed most favorably for him. *Lamb v. Perry*, 436.

38. *Same—Defendant's Evidence.*—Upon a judgment of nonsuit the only view in which the defendant's evidence is considered must relate to whether there is any part of it which, if favorably construed for the plaintiff, has a tendency to sustain his cause of action. *Ibid.*

39. *Appeal and Error—Retrial—Restrictive Issues—Measure of Damages—Burden of Proof.*—Where on appeal to the Supreme Court in an action to recover damages, a new trial is granted restricting the inquiry as to the amount thereof, it is reversible error for the judge at the retrial to put the burden of proof on the plaintiff to show that the alleged negligence of the defendant was the proximate cause, which had formerly been determined. *Morton v. Water Co.*, 468.

40. *Instructions—Evidence—Appeal and Error.*—A charge to the jury, in an action to recover fire damages to property, on the issue as to the quantum of damages, that, according to the plaintiff's evidence the property was valueless, is reversible error in the absence of such evidence. *Ibid.*

41. *Instructions — Statement of Contentions—Evidence—Tax Values—Appeal and Error.*—In this action to recover damages by fire to improvements on real property, a statement of the defendant's contention made by the trial judge, in his charge, that the property was listed at a certain sum, and that plaintiff had sworn that this sum was the true value, constitutes reversible error to the prejudice of the plaintiff, when his testimony fixed its value at a greater sum, the valuation of such property being fixed by the board of assessors, and the statement tending to mislead the jury. *Ibid.*

42. *Instructions—Special Requests—Appeal and Error.*—A refusal by the trial judge to give correct requests for special instruction is not error, if they are substantially given in the charge. *Medlin v. Tel. Co.*, 497.

43. *Appeal and Error—Assignments of Error—Exceptions.*—Assignments of error must rest upon exceptions taken at the time they are due in the orderly course of procedure, and should coincide with and not be more extensive than the exception itself; and no assignment of error will be considered on appeal unless founded upon an exception duly entered. *Harrison v. Dill*, 542.

44. *Appeal and Error—Evidence Rejected—Harmless Error.*—Where there is a will with two codicils, admittedly valid as to the will and first codicil, but the second codicil is sought to be set aside on the ground of fraud, declarations of the testator made some six or eight months before the date of the second codicil and previous to that of the first one, that the husband of the beneficiary was endeavoring to get the property therein devised to him, if the declarations were competent as evidence in the caveator's behalf, is not reversible error, under the facts of this case, it appearing that there was strong evidence that the mind of the testator had subsequently undergone a complete change towards the devisee, and that the evidence rejected, being merely cumulative, would not have affected the verdict. *In re Craven*, 561.

45. *Same—Admissions.*—Upon the trial to set aside a will for mental incapacity and undue influence, it appeared that the will had two codi-

APPEAL AND ERROR—*Continued.*

cils, the latter of which only was sought to be declared invalid, and that at the date of making the will and first codicil the testator was of sound mind, and was free from undue influence. The caveators offered a letter in evidence written by the beneficiary under the second codicil, bearing upon the mental condition of the testator, nearly three years before the second codicil was made and before the making of the first codicil. *Held*, the law presumes sanity when shown to exist until it appears to the contrary, and the rejection of the letter as evidence was immaterial or, at least, not prejudicial, sufficient mental capacity of the testator thereafter being shown with reference to the first codicil. *Ibid.*

46. *Appeal and Error—Torrens Law—Premature Appeals—Decision Upon Merits.*—An appeal from an order of the trial judge permitting answers to be filed after the time limited by the Torrens Law, chapter 90, Laws 1913, is premature; but at the request of both parties to this appeal, and owing to the public nature of the matter, the court passed upon the merits of the controversy, under former precedents. *Mfg. Co. v. Spruill*, 618.

47. *Appeal and Error—Objections and Exceptions—Evidence—Unanswered Questions—Contracts—Breach — Damages — Diminution.*—Where exception is taken to ruling out questions asked a witness on the trial, it must in some way appear what the answers of the witness sought to be elicited would have been, so that the Supreme Court may see wherein the appellant has been prejudiced; and while in this action to recover on a breach of contract the court recognizes and discusses the rule that the party injured is required to minimize his injury by the exercise of reasonable care, it is held that the appellant has not sufficiently shown by his evidence that he is entitled to its application. *Wilson v. Scarboro*, 654.

48. *Appeal and Error—Assignment of Error—Rules of Court—Counsel—Waiver.*—The rule requiring the assignment of errors in the record on appeal is for the benefit of the Court, and counsel cannot waive it. *Parrott v. Hardesty*, 668.

49. *Appeal and Error—Evidence—Statement of Contentions—Admissions.* Where the evidence of both parties are in harmony with the establishment of a certain fact, and the trial judge has erroneously stated it as an admission, the objecting party should have caused the correction to have been made at the time, and in this case no reversible error is found, the judge having clearly stated the contentions of the parties and applied the law applicable to the evidence. *Lupton v. Express Co.*, 671.

50. *Same—Instructions—Appeal and Error.*—In this action to recover damages for the negligent killing of plaintiff's intestate about 12 o'clock at night, there was evidence tending to show that the deceased was on his way home, a part of the distance being across the defendant railroad company's right of way, between two railroad crossings, and that trains passed about 11:25 p. m. and 3 a. m., one of which was run without an electric headlight and without giving crossing signals. The charge in this case held as error to the plaintiff's prejudice in not sufficiently instructing the jury upon the issues as to proximate cause; telling them, in effect, to answer the issue as to contributory negligence "Yes," if the deceased did not exercise ordinary care in going upon the track. *Treadwell v. R. R.*, 694.

APPEAL AND ERROR—*Continued.*

51. *Appeal and Error—Objections and Exceptions—Evidence Partly Competent.*—Where the evidence objected to as a whole is competent in part, the objection will not be sustained, though a part thereof is incompetent. *Weeks v. Tel. Co.*, 702.

52. *Appeal and Error—Objections and Exceptions—Statements by Court.* Objection, taken only in the assignments of error in the case on appeal, that the trial judge misstated the evidence to the appellant's prejudice, will not be considered on appeal, it being required that the attention of the trial judge be called thereto and exception taken, at the time or after the charge has beeen delivered, so as to afford him an opportunity to make the correction, if he has made the mistake. *Cotton Mill v. R. R.*, 721.

53. *Appeal and Error—Reversible Error—Equity—Instructions—Reformation.*—Where the plaintiffs, the heirs at law of the deceased wife, are seeking to engraft a trust upon the title to lands conveyed to the husband, their stepfather, upon allegation and evidence tending to show that the lands were bought with the money of the wife and that the deed should have been made to her, it is reversible error to defendant's prejudice for the judge to charge the jury that the plaintiffs must establish their claim by the greater weight of the evidence, it being required that they do so by clear, strong and convincing proof. *Glenn v. Glenn*, 729.

54. *Appeal and Error—Findings of Fact—Judgments—Excusable Neglect—Questions for Court.*—Upon appeal from the refusal of the Superior Court judge to set aside a judgment for excusable neglect where matters are alleged and relied upon as constituting a meritorious defense, the findings of fact of the judge will not be reviewed on appeal, but whether upon the facts found excusable neglect has been *prima facie* shown is a matter of law reviewable on appeal. *Gaylord v. Berry*, 734.

55. *Appeal and Error—Motions—Judgments—Excusable Neglect—Insufficient Findings—Case Remanded.*—On this appeal from the refusal of the judge of the Superior Court to set aside a judgment on the ground of excusable neglect, with proper allegations of fact upon the question of a meritorious defense, the case is remanded to the lower court with directions to set aside the findings and make new and fuller findings of fact, with leave to the parties to file additional affidavits, if they are so advised. *Ibid.*

56. *Appeal and Error—Objections and Exceptions—Evidence—Competent in Part.*—Where an *ex parte* affidavit has, by agreement of the parties, been received in evidence as a deposition, all irregularities being waived, and is competent in part, an exception thereto as a whole will not be sustained, it being required that the appellant should have specified the objectionable parts and excepted to them alone. *Goins v. Indian Training School*, 737.

57. *Appeal and Error—Material Error—Reversible Error.*—The courts will not grant a new trial when the objectionable evidence admitted is merely technical, or is not of sufficient importance to justify a belief that, except for the error, the result would have been different. *Ibid.*

APPEARANCE. See Attachment, 1.

Appearance — Jurisdiction — Motions to Dismiss — Term — Notice.—The plaintiff is not entitled to notice by the defendant entering a special

APPEARANCE—*Continued.*

appearance for the purpose of dismissing the action for the want of jurisdiction, and heard at a regular term of the court; and an exception to an order of the trial court dismissing the action, based upon the want of notice, cannot be sustained. *Wooten v. Drug Co.*, 64.

ARBITRATION AND AWARD.

1. *Arbitration and Award—Waiver.*—Where the parties to a controversy have submitted the matters in dispute to arbitration, an agreement between them, that the controversy be submitted *de novo* to the court, is a waiver of all rights thereunder, and the award will not conclude them. *Barnes v. Fort*, 432.

2. *Arbitration and Award—Lands — Contracts in Writing — Description.* An agreement to arbitrate a matter in dispute must be in writing when relating to the title to land, and describe the land with reasonable particularity, in order for it to be binding or enforcible. *Cutler v. Cutler*, 482.

3. *Arbitration and Award—Contracts — Agreement — Scope of Powers—Ultra Vires Acts—Estoppel.*—Arbitrators derive their power to act from the contract or agreement of the parties to arbitrate, and when such is sufficient for them to ascertain or determine which of the contesting parties is the owner of the title to land, and this question alone is submitted to them, an award finding or recommending that one of the parties should pay the other a certain sum of money, whereupon the other should convey the title to him, is not within the terms of the agreement, but, in effect, an attempt to compromise, and therefore, being void, will not estop the parties in an action subsequently commenced. *Ibid.*

ARREST OF JUDGMENTS. See Indictment, 2.

ASSAULT. See Homicide, 2.

ASSUMPTION OF RISKS. See Master and Servant, 5, 21; Commerce, 8.

ATTACHMENT.

Attachment — Nonresidents — Replevy Bond — Appearance — Submission to Jurisdiction—Interpretation of Statutes.—Where proceedings in attachment have been properly entered and prosecuted against a nonresident defendant having property in this State, except that no order for or publication of the summons or personal service has been made, a bond given by defendant in discharge of the writ is a voluntary submission of defendant's cause to the jurisdiction of the court, our statutes, Revisal, secs. 774 and 775, requiring that such bond shall only be received after a general appearance entered, etc. *Mitchell v. Lumber Co.*, 397.

ATTORNEY AND CLIENT. See Trusts, 18; Judgments, 18.

Evidence — Declarations — Attorney and Client.—The declarations of an attorney respecting the boundaries of his client's land are not binding upon his client, and incompetent as evidence in an action to determine them. *Lumber Co. v. Lumber Co.*, 82.

AUTOMOBILES. See Insurance, 2; Negligence, 1.

BAILMENT.

1. *Bailment—Implied Liability—Negligence—Fraud—Contracts—Insurer.* At common law a contract of bailment places by implication an

BAILMENT—*Continued.*

undertaking upon the bailee to execute the bailment purposes with due care, skill and fidelity, or reasonable care in protecting and caring for the subject of bailment, which may be changed by special contract, making the bailee's responsibility that of an insurer, irrespective of negligence or fraud in the breach of the bailment contract. *Cooke v. Veneer Co.*, 493.

2. *Same—Rent of Barge.*—Where a barge is rented under a contract that it will be returned to the owner in as good condition as when received, ordinary wear and tear excepted, and it appears that the barge was in condition to fulfill the requirements contemplated and that while in the bailee's possession and service it turned over in the water, delaying its return: *Held*, the bailee is liable for the rent thereof until its return to the owner, irrespective of the question of its negligence, the only available defense being the "act of God or the king's enemies." *Ibid.*

BANKS AND BANKING. See Bills and Notes, 4, 9, 11; Contracts, 9; Pleadings, 5.

Bank sand Banking—Bills and Notes—Collaterals—Excess—Corporations—Receivers—Actions.—A local bank having borrowed money from the plaintiff bank, hypothecating the note sued on and others as collateral, and since then becoming insolvent, and it is made to appear that the plaintiff has realized from the other securities of the borrowing bank more than sufficient to pay off the latter's indebtedness, without resort to the note in suit, the remedy is for the receiver of the insolvent bank to institute an action to recover the amount in excess of that due to the plaintiff. *Bank v. Hill*, 236.

BILL OF RIGHTS. See Constitutional Law, 1.

BILLS AND NOTES. See Banks and Banking, 1; Contracts, 9; Pleadings, 5.

1. *Bills and Notes—Holder—Due Course—Collateral Notes—Action.*—The holder of a negotiable instrument in due course may maintain an action thereon against the maker, when properly transferred, though taken as collateral to a note given by his indorser; for the mere fact that the note was indorsed as collateral does not affect the matter of due course. *Bank v. Hill*, 235.

2. *Bills and Notes—Equitable Title—Original Defenses.*—Where the plaintiff in his suit to recover upon a negotiable note proves only an equitable title, it is subject to equitable defenses existing between the original parties. *Ibid.*

3. *Same — Counterclaim — Pleadings — Parties.*—Where the maker of a negotiable note seeks to set up equitable defenses to its payment as against a holder who has acquired it as collateral to the note of his immediate indorser, upon the ground that the former had other collateral more than sufficient for its payment and the latter was indebted to the defendant, to sustain the counterclaim the defendant must show that his note had been paid by the sale of the other collateral or in some other manner, and his pleading of his counterclaim must allege a sum certain due by the plaintiff's indorser. *Ibid.*

4. *Bills and Notes — Pleadings — Counterclaim — Banks and Banking—Equitable Estoppel.*—Where a note negotiable on its face is given by the maker and discounted at the bank by the payee, and at maturity this note is taken up by the maker at the bank by another note of

BILLS AND NOTES—*Continued.*

his, wherein the bank is made the payee and the old note canceled, the maker may not set up as against the bank the defense that the original note was given in part payment for lands, the title to which proved defective, for if the payee had any such equity it was his duty to have informed the bank of his right at the time it received the renewal note. *Ibid.*

5. *Bills and Notes—Indorsement of Credit—Ambiguity—Open Accounts—Evidence.*—In an action upon a note and an open account presenting the question of whether an indorsement on the note, received on "the above" a certain sum, referred to the payment of the open account, with the balance as a credit upon the note, it is *Held*, that the words of the indorsement, "the above," were ambiguous of meaning, and permitted evidence, in plaintiff's behalf, that the open account was attached to the note at the time of the indorsement of credit, and that the indorsement referred to it. *Huffman v. Lumber Co.*, 259.

6. *Bills and Notes — Negotiable Instruments — Signature on Back — Indorsers—Dishonor—Notice.*—One who signs his name on the back of a negotiable instrument, without indication that he did so in any other capacity, is deemed an indorser and is entitled to notice of dishonor. *Bank v. Johnston*, 526.

7. *Bills and Notes—Negotiable Instruments—Indorsers—Dishonor—Notice—Waiver.*—Notice of dishonor may be waived by an indorser of a negotiable paper before or after maturity thereof by express words or by necessary implication, and when so waived, notice of dishonor need not be given. Revisal, secs. 2239, 2559, 2260, 2261, 2270. *Ibid.*

8. *Same—Extension of Time—Maturity—Agreement—Guarantors of Payment.*—Where it is expressly agreed upon the face of a negotiable note given by the maker to the bank that "the subscribers and indorsers hereby agree to continue and remain bound . . . notwithstanding any extension of time granted to the principal, hereby waiving all notice of such extension of time," and upon maturity an indorser thereon agrees to a further extension, and notice of dishonor is not given him when the instrument again matures, and he seeks to avoid liability for that reason: *Held*, his having notice of dishonor and nonpayment of the note at its original maturity and consenting to the extension make his liability on the paper absolute, as a guarantor of payment, not requiring further notice of dishonor to be given him. *Ibid.*

9. *Bills and Notes—Banks and Banking—Collateral Notes—Other Indebtedness—Contracts.*—Where a collateral note given to the bank for borrowed money provides that the collateral may be appropriated by the bank to the "extinguishment of this note or of any other liability of the undersigned to the bank, whether now existing or hereafter arising," etc., the provision of the note applies only to transactions directly between the maker of the note and the bank, and not to notes given by the maker to third persons and thereafter purchased by the bank. *Newsome v. Bank*, 534.

10. *Same—Officers—Knowledge Implied—Trusts and Trustees.*—A director of a bank is affected with knowledge of the transactions between the bank and those dealing with it in the course of its business; and where the proceeds of sale of collateral to a note the bank holds is more than sufficient to pay off the indebtedness of the maker, the bank holds the surplus in trust for the maker; and it would be a

BILLS AND NOTES—*Continued.*

breach of trust, not permissible, for it to allow one of its directors to sell a note he holds of the same maker to the bank, and apply this surplus to its payment under a general provision in the note, with collateral, that the collateral was likewise applicable to the maker's general indebtedness to the bank. *Ibid.*

11. *Bills and Notes—Banks and Banking—Collaterals—Trusts and Trustees — Breach of Trust.*—The collateral given with a note to the bank is held by the bank in trust for the maker, and the bank is not permitted to divert the surplus of the proceeds of the sale of the collateral contrary to the terms of the trust as expressed in the note. *Ibid.*

12. *Same—Bank Directors — Fraud — Releasing Trust Fund — Creditors' Bill.*—A plaintiff bank having acquired from one of its directors a note indorsed by the director, upon the agreement that it would first exhaust the collateral to another note given by the same maker to the bank, alleged fraud of the maker of the note in procuring the collateral, and attempted to convert the action into a general creditors' bill, and subject the surplus of the collateral to the payment of the first note, which did not come within the terms of the latter one. It appeared that the bank was the only creditor prosecuting the action, and it is held that the bank was required to first relinquish the collateral it held as trustee before it would be permitted to institute an action of this character. *Ibid.*

13. *Bills and Notes—Banks and Banking—Trusts and Trustees—Division of Funds—Receivers—Accounting.*—Where a note to a bank has been paid in full by the sale of collateral thereto, and a surplus then remains in the hands of the bank, which it wrongfully seeks to apply to other indebtedness of the maker, and it appears that the surplus has been placed in the hands of a receiver pending an action brought by the maker of the note against the bank, it is held that the maker is entitled to a decree that the receiver pay over to him the ascertained surplus; and a personal judgment should be entered in the bank's favor against the maker for the amount due by him. And it not appearing in this case whether the maker or receiver has paid the original obligation of the maker to the bank, an accounting between them will be ordered. *Ibid.*

BOND ISSUES. See Elections, 1; Drainage Districts, 4; Municipal Corporations, 4.

BOOKS. See Trials, 14.

BOUNDARIES. See Appeal and Error, 7; Deeds, 13, 38, 41; Public Lands, 1, 5, 6.

BRIDGES. See Highways, 5.

BURDEN OF PROOF. See Pleadings, 7; Telegraphs, 8; Trespass, 1; Commerce, 5; Master and Servant, 22; Deeds, 29; Evidence, 1, 11; Libel and Slander; Public Lands, 12, 14, 15; Trusts, 2; Wills, 12; Carriers of Goods, 4; Appeal and Error, 39.

BURGLARY. See Trials, 13.

CANCELLATION. See Judgments, 19; Wills, 10, 11, 12.

Cancellation of Instruments—Instructions — Fraud — Confidential Relations.—In an action to set aside a transaction for fraud arising from

CANCELLATION—*Continued.*

the confidential relationship of the parties, an exception to the charge of the court that there was no evidence of such relationship is not sustained when it appears from the charge that the court instructed the jury that the confidential relationship existing would not create the presumption of fraud. *Mitchem v. Mitchem*, 48.

CARRIERS OF GOODS. See Intoxicating Liquors.

1. *Carriers of Goods—Delivery—Principal and Agent—Trials—Evidence—Expression of Opinion—Statutes.*—In an action by the consignee against the carrier of goods to recover damages for the failure of the latter to deliver the shipment, where there is evidence tending to show that a certain drayman customarily received the goods for the plaintiff, to whom delivery had been made, without giving a receipt therefor by the defendant, a charge by the court to the jury is held correct, that if they found that the drayman was the authorized agent of the plaintiff, a delivery to him would be a delivery to the plaintiff; and an expression by the judge that a delivery by the defendant without taking a receipt was a careless act, is not held, under the circumstances, as an expression of opinion by the court, prohibited by the statute, or was intended, or understood by the jury, in the sense of a reflection upon the moral character or integrity of the agent, defendant's witness, who had testified to the fact. *Cotton Mill v. R. R.*, 721.
2. *Carriers of Goods—Bills of Lading—Reasonable Stipulations—Contracts.*—A bill of lading issued by a railroad company for the transportation and delivery of freight, when accepted by the shipper and consignee, becomes a valid and binding contract between them as to all reasonable stipulations thereon. *Culbreth v. R. R.*, 723.
3. *Same—Claims for Damages—Conditions Precedent—Limitation of Actions—Contracts Against Negligence—Public Policy.*—A stipulation on a freight bill of lading that "Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or in case of failure to make delivery of the property, then within four months after a reasonable time for delivery has elapsed," or the carrier shall not be liable, is a reasonable and valid stipulation requiring the performance of the condition as giving an opportunity to avoid unconscionable claims, and is not regarded as a stipulation limiting the liability of the company for damages arising from its own negligence. *Ibid.*
4. *Carriers of Goods—Bills of Lading—Reasonable Stipulations—Trials—Evidence—Burden of Proof.*—Where the plaintiff seeks to recover damages to a shipment of goods under a bill of lading requiring notice of claim in writing to be given within a certain time, and the stipulation is reasonable and valid, the burden is on the plaintiff to show a compliance therewith. *Ibid.*
5. *Same—Nonsuit.*—Where the plaintiff, in her action to recover damages to a shipment of goods, has failed to show by her evidence a compliance with a valid stipulation in a bill of lading, requiring notice to the defendant of her claim before such loss may be recovered, and a judgment of nonsuit is entered, she may, in another action therefor, show, if she can, the required notice had been given by her. *Ibid.*

CARRIERS OF PASSENGERS.

1. *Carriers of Passengers—Shortest Route—Ejection of Passenger—Passenger Misled.*—Where a passenger on a railroad train buys a mileage book, exchanges his mileage for a ticket to his destination upon the assurance of the local agent that the train would make connection at a certain junction en route the shortest distance, but, if not, his ticket would carry him by another connection over a longer route, which latter he attempts to take upon failure of the promised connection, and he is ejected from the train upon his refusal to pay the difference in money for the longer distance, after the defendant's conductor had been informed of the circumstances, it is held that the ejection was wrongful, notwithstanding the ticket read that the journey was to be made by the shortest route. *Hallman v. R. R.*, 127.
2. *Carriers of Passengers—Arrest of Passenger—Request of Passenger—Police Officers.*—Where a conductor on a train telephones ahead to a town for officers to arrest a passenger for improper conduct, orders his arrest accordingly, and an action is brought against the railroad company for damages, the defendant is not responsible for the treatment given the plaintiff after his arrest and in which its employees took no part, the questions presented being whether the conduct of the plaintiff, while a passenger, and preceding the arrest, was such as to justify the conductor in calling upon the policeman to make it; and not for indignities the policeman may thereafter have committed on the plaintiff's person. *Carver v. R. R.*, 204.
3. *Same—Punitive Damages—Evidence.*—Punitive damages are recoverable against a railroad company causing the arrest of a passenger, in the discretion of the jury, only where the passenger has been arrested by the defendant's conductor or other proper employee, and there are elements of fraud, malice, gross negligence, insult, or other cause of aggravation in the act causing the injury or humiliation. *Ibid.*
4. *Carriers of Passengers—Negligence—Evidence—Train Records — Corroborative Evidence—Railroads.*—Where damages are sought for a personal injury alleged to have been inflicted by reason of defendant having stopped its passenger train at an unusual stopping place, where the plaintiff alighted therefrom, exception that the conductor testified from his record of the train alone that the place was the usual one will not be sustained, when it appears that he testified to the fact directly and then stated that the train sheet, which he then examined, would have shown had it stopped at an unusual place, which it did not show. *Greene v. R. R.*, 532.
5. *Carriers of Passengers—Instructions—Inferential Evidence—Appeal and Error—Trials—Railroads.*—Where, in an action to recover damages for a personal injury alleged to have been inflicted on a passenger while alighting from defendant's passenger train, there is evidence tending to show, as contended for by the plaintiff, that the injury occurred when the train stopped at an unusual place, and for the defendant that it did not stop until it got to its usual stopping place beyond, the jury has a right to accept as true a part of the plaintiff's evidence, and find that the injury occurred at the place contended for by him, but before the train stopped, and a contention of the parties stated by the court to this effect is not erroneous, though there is no direct evidence thereof. *Ibid.*

CERTIFICATE. See Husband and Wife, 2; Constitutional Law, 7.

CITIES AND TOWNS. See Municipal Corporations; Deeds, 39.

CLAIM AND DELIVERY. See Logs and Logging, 2.

CLERKS OF COURT. See Torrens Law; Constitutional Law, 7.

COLOR OF TITLE. See Deeds; Trespass, 2; Possession, 1, 2; Taxation, 1.

COMMERCE. See Intoxicating Liquors, 2, 7, 8.

1. *Interstate Commerce—Statutes—Carmack Act—Water Transportation—Damages—Constitutional Law.*—The Carmack amendment to the Interstate Commerce Act, 34 St. at Large, 594, is constitutional and valid, and in case of shipments coming within its terms, the initial carrier is made responsible for any "loss, damages, or injury to the goods carried by it or by any common carrier, railroad or transportation company," not as absolute insurers, but to be fixed and determined according to the principles of general law applicable to common carriers as modified by statutes relevant to the subject. *Brinson v. R. R.*, 425.

2. *Interstate Commerce—Water Transportation—Connecting Carriers—Federal Statutes—Limiting Liability—Defenses.*—Where a railroad company receives an interstate shipment of freight, without designation as to route, and any carrier along the usual route of shipment is a carrier by water, and loss or damage occurs by wrong of the latter company, the initial carrier may avail itself of Federal legislation applicable to transportation companies of that character, limiting the quantum of recovery in certain instances, and at times relieving of responsibility, upon the principle that the initial carrier, so far as the shipper is concerned, is held liable for through transportation, and, being liable for the default of the connecting carrier, may avail itself of any defenses or liabilities open to the latter. *Ibid.*

3. *Interstate Commerce—Federal Statutes—Water Transportation—Connecting Carriers—State Courts—Jurisdiction.*—Where an initial carrier of an interstate shipment of goods requiring transportation by water along a usual route to its destination is sued in the State court for damages arising while in the possession and control of the connecting carrier by water the defenses available under the Federal statutes (U. S. Compiled Statutes, secs. 4289, 4283) may be made available in a State court having cognizance and jurisdiction of the cause of action. *Ibid.*

4. *Interstate Commerce—Water Transportation—Federal Statutes—Limiting Liability—Negligence—Utmost Care.*—Where the owner of a vessel sets up the Federal statutes limiting his liability, the burden is upon him to show, in order for him to avail himself of the protection afforded by them, that he has provided the vessel with a competent master and competent crew, and that the ship, when she sailed, was in all respects seaworthy; that he therein exercised such utmost care as the most prudent and careful men exercise in their own matters under similar circumstances. 3 U. S. Compiled Statutes, secs. 4289, 4283. *Ibid.*

5. *Interstate Commerce—Federal Statutes—Water Transportation—Negligence—Prima Facie Case—Burden of Proof.*—Where it is shown that a railroad company has accepted goods for interstate

COMMERCE—*Continued.*

shipment and that they have not been delivered to the consignee, a *prima facie* case of negligence is established both under the State and Federal laws; and where the railroad seeks the benefit of the Federal statutes limiting liability where the damages sought have occurred while in the course of transportation by a connecting water company, the burden of proof is on the defendant to show such facts as will bring it within the provisions of such statutes; and upon its failure to introduce evidence in this respect, the right will be denied. *Ibid.*

6. *Railroads—Interstate Trains—Interstate Commerce—Local Switching—Federal Employer's Liability Act.*—A train made up and ready to start for its destination beyond the State, with steam up in the locomotive and the engineer in the cab, and moving under the usual signals from a switchman, who was one of the crew of a switching engine, engaged in cutting out a defective car from the train, is regarded as an interstate train, and the company is liable in damages for its negligent injury to the switchman, under the Federal Employer's Liability Act, as the duty he was performing at the time, though he was engaged on a local switching engine, was one performed while he was employed in interstate commerce. *Sears v. R. R.*, 447.

7. *Same—State Statute.*—In this action, which was brought by a switchman of the defendant's train crew to recover damages for alleged negligence of the defendant in providing an improper coupler on a train made up and ready to start for a destination beyond the State, it is held that the question whether the train was an interstate one, or the plaintiff was at the time engaged in interstate commerce, is not material, it appearing that the alleged negligent wrong was committed since the enactment of ch. 6, Public Laws of 1913, which, in this respect, is substantially identical with the Federal statute. *Ibid.*

8. *Same—Contributory Negligence—Assumption of Risks—Trials—Issues.*—When either the State or Federal statute is applicable in an action involving the liability of a railroad company to its employee, arising from its negligence, and the jury have found that the plaintiff, a switchman, was injured by a defective coupler on the train while in the performance of his duties, the defenses of contributory negligence and assumption of risks are eliminated, and issues thereon are immaterial, under our statutes or the Federal law. *Ibid.*

COMMON SOURCE. See Deeds, 22.

CONCEALED WEAPONS. See Criminal Law, 2.

CONDEMNATION. See Statutes, 4; Drainage Districts, 6; Easements; Railroads.

CONFIDENTIAL RELATIONS. See Cancellation, 1.

CONFLICT OF LAWS. See Intoxicating Liquors, 8.

CONSENT. See Judgments, 14, 15, 18.

CONSIDERATION. See Contracts; Deeds; Mechanics' Liens; Trusts.

CONSTITUTION, STATE.

ART.

I, sec. 6. An act providing for drainage of lands without compensation to private owner is unconstitutional. *Lang v. Development Co.*, 662.

I, secs. 11, 12, 13. The charge in the indictment and the evidence must substantially correspond. *S. v. Gibson*, 318.

IV, sec. 27. Legislature may establish courts and confer special jurisdiction. *Oil Co. v. Grocery Co.*, 521.

VI, sec. 1. Females excluded from exercise of right of suffrage. *S. v. Knight*, 333.

VI, sec. 8. Females excluded from exercise of right of suffrage. *S. v. Knight*, 333.

VII, sec. 7. An act authorizing a municipality to issue bonds for lighting, sewer, water-works, municipal building, are for necessities, not requiring a vote of the people. *Kinston v. Trust Co.*, 207.

IX, sec. 2. This section is not contravened by Revisal, 4029, relating to ch. 89, Revisal, providing the apportionment of school funds, etc., per capita. *School Commissioners v. Board of Education*, 196.

XIV, sec. 7. The position of mail carrier and constable are offices, within the meaning of the Constitution. *Groves v. Barden*, 8.

CONSTITUTIONAL LAW. See Courts, 8, 9, 14; Taxation, 7, 9; Commerce, 1; Schools, 4; Drainage Districts, 6; Health, 1; Highways, 1; Husband and Wife, 1; Criminal Law, 1; Easements, 2; Indictment, 9; Intoxicating Liquors, 1, 2; Lotteries; Municipal Corporations, 4; Officers, 1; Physicians, 2; Railroads, 3; Schools, 2; Statutes, 3.

1. *Constitutional Law—Bill of Rights—Due Process.*—The "law of the land" as used in our Bill of Rights is equivalent to "due process of law," requiring in its essential elements that notice and opportunity to defend be given the party accused. *State v. Collins*, 323.

2. *Same—Appeal and Error—Findings of Court—Frivolous Prosecution—Costs—Procedure.*—Where the trial judge has dismissed a criminal action as being frivolous and malicious, and taxed the prosecutors with costs, and it appears from his findings of record that he has done so without any proper consideration of their affidavits in support of their position, and relevant to the issue, so as to deprive them of the benefits of due process of law, his order will be set aside on appeal, leaving the matter open for proper adjudication. *S. v. Hamilton*, 106 N. C., 660, cited and distinguished. *Ibid.*

3. *Constitutional Law—Suffrage.*—Suffrage is not a natural or inherent right, and being a privilege conferred by the State, the Constitution, Art. VI, sec. 1, by conferring this right upon males alone, excludes females from the exercise thereof. *State v. Knight*, 333.

4. *Same—Woman Suffrage—Males.*—Article VI, sec. 7, only provides for the eligibility of voters to office, except those disqualified by Article VI, sec. 8, which latter section refers to males who deny the existence of God, or who have been convicted of crime; and while the word "persons" appearing in said section 8 is comprehensive enough to include women, by correct interpretation it properly refers to males upon whom the right to vote is conferred by Article VI, sec. 1, with the disqualification stated in section 8, and the maxim, *Expressio unius est exclusio alterius*, obtains. *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

5. *Constitutional Law—Public Offices — Notaries Public — Interpretation of Statutes.*—The position of notary public is a public office, so recognized by common law and by proper interpretation of the Revisal, secs. 2347, 2348, 2350, 2351 and 2352, and so regarded by the various departments of our State Government, inclusive of the decision of the Supreme Court, until the enactment of chapter 55, Public Laws of 1915. *Ibid.*

6. *Constitutional Law—Public Office — Oath of Office — Test — Notaries Public.*—The requirement of an incumbent to take the oath to support the Constitution is not held to be the test of whether a position under the State Government is an office, but, were it otherwise, the position of notary public requires this oath, and it would nevertheless be an office within the meaning of the Constitution. *Ibid.*

7. *Constitutional Law—Public Office—Extent of Duties—Test—Notaries Public—Judicial Acts—Clerks of Courts—Certificates.*—The extent of the power exercised by one holding a public position is not determinative of the question of whether such position is an office within the meaning of the State Constitution, but whether the power in fact exists; and in many respects the functions exercised by a notary public are of a judicial character (Revisal, sec. 2359), and objection that such are exercised alone by the clerk in certifying and adjudicating the probate is untenable. *Ibid.*

8. *Constitutional Law—Public Office—Notaries Public—Trust and Profit —Woman Suffrage—Legislative Power.*—All offices, whether named by the Legislature or by the Constitution, fall within one of the departments of the State Government and exist under the Constitution and subject to its restrictions; and the position of notary public being a public office, within the meaning of the Constitution, the Legislature are without authority to declare it only a "place of trust and profit," and thus enact that women, who are not voters and therefore ineligible to hold an office, may qualify to the position of notary public. *Semble*, the Legislature has not made any change in the law by stating that the position of notary public is a place of trust and profit. *Ibid.*

9. *Constitutional Law — Legislative Acts — Interpretation — Power of Courts.*—It is required of the courts in the exercise of their sworn duty, to uphold the Constitution of the State, and when the constitutionality of a legislative act is questioned, the courts will place the act side by side with the Constitution, with the purpose and desire to uphold the act if it can reasonably be done; but if there be an irreconcilable conflict between the two, to that extent will the act be declared unconstitutional. *Ibid.*

CONTRACTS. See Carriers of Goods, 2; Corporations, 10; Mechanics' Liens, 13; Appeal and Error, 4, 7, 10; Courts, 2; Deeds, 1, 33; Insurance; Telegraphs; Vendor and Purchaser, 1, 7, 10; Equity, 2; Husband and Wife, 1; Limitation of Actions, 3; Trials, 16; Liens, 1; Bills and Notes, 9; Bailment, 1; Arbitration and Award, 2, 3.

1. *Equity—Vendor and Purchaser—Contracts—Rescission—Instructions —False Representations.*—In an action to rescind a sale of a business for fraud, the evidence was conflicting as to whether the vendor represented that the net profits were in a certain sum, or that the gross profits were in that amount, the former being the alleged false

CONTRACTS—*Continued.*

representations relied upon by the plaintiff, and it is held no error for the judge to have instructed the jury to answer in plaintiff's favor if the representation was made as to the net profits, but for the defendant if made as to the gross profits, with the burden of proof on the plaintiff. *Mitchem v. Mitchem*, 48.

2. *Contract, Written—Parol Evidence.*—Where a contract which the law does not require to be in writing is partly written and partly rests in parol, evidence of the parol agreement is competent to show the entire contract when not contradictory of the written part. *Spencer v. Bynum*, 120.

3. *Same—Partnership—Dissolution.*—A written agreement for dissolution of a partnership providing that one of the partners should take charge of the assets, apply them to payment of debts, and distribute the balance among the partners, is not varied by a parol contemporaneous agreement that each of the partners should lose any amount then due him by the firm. *Ibid.*

4. *Same—Consideration.*—An agreement between partners for dissolution of the firm, that one of them shall take charge of the business for that purpose, another buy certain of its property to enable the firm to pay its debts, and that a charge for mismanagement against a third partner would not be made, affords a sufficient consideration to support the agreement. *Ibid.*

5. *Contracts—Mutual Subscriptions—Consideration.*—When persons mutually subscribe a stated sum for a definite and lawful object, the subscription of one may be regarded as a proper consideration for that of the other; and when work has been done or expenditures made or debts incurred on the faith of such subscription, it then becomes a binding obligation. *Rousseau v. Call*, 173.

6. *Contracts, Written—Parol—Contemporaneous Agreement—Evidence—Statute of Frauds—Subscriptions.*—The rule that when a contract, not required by law to be in writing, is partly written and partly oral, the latter may be shown, does not apply when the writing is contradicted by the oral part; and where a written list of voluntary signatures to a subscription states that the signers "subscribe and bind ourselves to pay in cash, as called for by J. M., treasurer," etc., and the purpose is to build a certain road, it is inadmissible for the subscriber to show by a contemporaneous verbal agreement that he subscribed upon other conditions than those contained in the writing, which had not been performed. *Ibid.*

7. *Contracts, Written—Interpretation—Intent.*—A written contract or agreement should be interpreted to carry out the intention of the parties as gathered from the language used therein, the nature of the instrument in proper instances, from the condition of the parties executing it and the objects they had in view. *Bank v. Furniture Co.*, 180.

8. *Same—Guarantors of Payment.*—While in contracts of guaranty words of ambiguous and doubtful import are construed most strongly against the guarantor, this rule will not be extended to enlarge the obligations of the guarantor beyond the scope and purpose of his agreement and the reasonable interpretation of the terms expressed therein. *Ibid.*

CONTRACTS—*Continued.*

9. *Same—Bills and Notes—Banks and Banking—Third Parties.*—Where the directors of a corporation entered into a written agreement with its banking house to pay all of its indebtedness thereto "which now exists or may hereafter be created, whether by note, acceptance, overdraft, indorsement," etc., to the extent of a certain amount, and the agreement sets forth that it is to avoid the necessity of individual indorsement of the directors in each transaction to the said bank, it is *Held*, that by proper interpretation of the contract and the conditions existing at the time the guaranty applied to transactions between the corporation and the bank, and it was not intended or agreed that the directors should become liable on a note given by the corporation to a third person and discounted in a transaction solely between such third person and the bank. *Ibid.*

10. *Contracts—Commissions—Deeds and Conveyances—Probate—Seals—Evidence.*—In an action to recover commissions for obtaining title to a certain copper mine, wherein the defendant denies the agreement and refuses to accept the conveyance, it is competent for the plaintiff to put in evidence the deed to show performance on his part, though the required seal of the probate officer had not been attached, this being confined to the purpose for which it was admitted, and not as evidence of title; it being permissible for the seal of the officer to be affixed upon defendant's accepting the deed. *Shepherd v. Taylor*, 288.

11. *Contracts, Written—Parol Evidence.*—A contract that the law does not require to be in writing may partly be in writing and partly rest by parol, but parol evidence is not permissible to vary or contradict the written part. *Bland v. Harvester Co.*, 418.

12. *Contracts—Warranty—Conditions—Compliance.*—Where a sale of merchandise is made under a certain warranty, specifying that the purchaser shall give the goods three days trial, and should they fail to fulfill the warranty, written notice shall be given at once to the seller or his agent, it is the duty of the purchaser to give the required notice within a reasonable time in the event of a breach of warranty. *Ibid.*

13. *Contracts—Warranty—Implied—Value.*—In an action for breach of warranty of the goods sold, the principle that there is an implied warranty that the goods shall be of some value has no application when it appears that the purchaser uses them for the purposes for which he purchased them. *Furniture Co. v. Mfg. Co., ante*, 41, cited and distinguished. *Ibid.*

14. *Damages—Crops—Breach of Contract—Trials — Insufficient Evidence —Speculative Damages.*—In an action to recover damages to a crop for the alleged failure of the defendant to furnish a mule for the purpose under his agreement to do so, evidence of such damages which merely compares the yield of that year with what the plaintiff had prevously made with a mule is too speculative and uncertain to be submitted to the jury upon the issue. *Perry v. Kime*, 540.

15. *Contracts—Deeds and Conveyances—Felled Timber—Personalty—Statute of Frauds.*—An agreement to cut, haul, etc., timber after it has been severed from the lands relates to presonal property, and does not come within the provisions of the statute of frauds, re-

CONTRACTS—*Continued.*

quiring contracts affecting real property to be in writing. *Thomas v. Merrill*, 623.

16. *Contracts—Breach—Timber—Evidence—Measure of Damages — Lumber—Market Value.*—In an action to recover damages for a breach of contract whereby the plaintiff was prevented from cutting the timber contracted for on the defendant's land, it is competent, upon the issue as to the measure of damages, for the plaintiff to show the market value of lumber in that locality as a basis for showing his loss after deducting the cost of manufacture, etc. *Wilson v. Scarboro*, 654.

17. *Same—Particular Sales—Corroborative Evidence.*—Where, upon the issue as to the measure of damages arising from a breach of contract in the sale of timber, evidence of the market value of lumber in that locality is relevant and competent, it is permissible to show prices obtained for particular sales of lumber, for such, in the aggregate, show the market value thereof; and evidence of particular sales is especially competent when corroborative of testimony of the market value of the lumber at the time and place. *Ibid.*

18. *Contracts — Purchase Price — Definite Sum — Pleadings — Issues.* — Where the plaintiff in his action seeks to recover a certain sum in addition to that he has received from the defendant for his land, and the defendant denies that he owes more than he has paid, with conflicting evidence as to the extent of the plaintiff's interest in the lands, but the defendant does not seek to set aside the sale and there is no averment of imposition or fraud: *Held*, no issue is raised in diminution or rebuttal of the plaintiff's demand, the question being whether or not the defendant had definitely agreed to pay this further sum of money. *Holden v. Royall*, 677.

19. *Contracts—Restraint of Trade—Interpretation of Statutes—Common Law.*—An incorporation of fish dealers in a seaport town, with provision in the bill of sale of each business to the corporation, that the seller will not engage or become in any way interested in the same business in that and an adjoining county, and within a hundred miles from the town, for a period of ten years; and it appearing that the business engaged in by the corporation was at least coextensive with the territory prohibited, and that the transaction did not have the effect of lessening competition, is not prohibited by our statute, chapter 41, section 5, subsecs., Laws of 1913, which excepts from its inhibition persons, firms or corporations selling his or its business and good-will to a competitor, and agreeing in writing not to enter the business in competition with the purchaser in a limited territory, as now allowed by the common law. *Sea Food Co. v. Way*, 679.

20. *Contracts—Restraint of Trade—Partial Restraint—Reasonable Restrictions.*—Under modern conveniences and changed business methods and conditions the common-law doctrine relating to transactions in restraint of trade has been modified and its meaning enlarged, the courts having soon recognized the distinction between contracts in general restraint and those in partial restraint of trade, sustaining the latter if they are not unreasonable. *Ibid.*

21. *Same—Territory—Competition—Public Policy.*—A valid contract in partial restraint of trade, while primarily for the advantage of the purchaser of a business, inures to the benefit of the seller by en-

CONTRACTS—*Continued.*

hancing the value of the good-will and enabling him to obtain a better price for the sale of his business, the test as to territory being whether the restraint agreed upon is such as to afford a fair protection to the interest of the party in whose favor it is given, and not so large as to interfere with the interest of the public; and such will not be held to be unreasonable when they do not affect the public and go no further than to remove the danger to the purchaser of competition with the seller. *Ibid.*

22. *Contracts—Payment—Time and Place—Requirement of Obligee.*—Where an instrument fixes a time and place for the payment of money, the person to whom it is to be made should accordingly be present in person or by agent to receive it. *Taylor v. Munger*, 727.

CONTRIBUTORY NEGLIGENCE. See Pleadings, 7; Telegraphs, 7.

CONVEYANCES. See Deeds; Fraudulent Conveyances.

CORPORATIONS. See Wills, 13; Liens, 1; Banks and Banking; Receivers.

1. *Corporations — Shares of Stock — Collateral — Transfer on Books — Judgment Creditor — Priorities.*—A pledgee of certificates of stock in a private corporation does not lose his priority of lien to an attachment creditor because the transfer of the collateral has not been theretofore made on the books of the corporation (Revisal, sec. 1168); for the books not being open to public inspection, no good purpose would be thereby subserved, and the effect of a requirement of this character would be to restrict the negotiability of the stock, unduly hamper commercial transactions in respect to it, and consequently depreciate its value. *Bleakley v. Candler*, 16.

2. *Liens—Private Corporations—Laborers—Corporate Mortgages—Registration—Interpretation of Statutes.*—Revisal, sec. 1131, giving a lien by judgment upon the property or earnings of a private corporation to those performing labor, etc., superior to that of a mortgage, expressly refers to a mortgage given by the corporation itself, and not to mortgages on the corporate property acquired by a stranger and registered before the formation of the corporation. *Roberts v. Mfg. Co.*, 27.

3. *Same — Insolvent Corporations — Assets — Liens.*—Property acquired by a private corporation subject to a valid and registered mortgage does not become assets of the corporation except as subject to the prior lien; and the lien given to laborers on the assets of an insolvent corporation for work done under the conditions stated in Revisal, sec. 1206, cannot affect the vested rights obtained by the prior lien holders. *Roberts v. Mfg. Co.*, 27.

4. *Corporations — Liens — Laborers — Mortgages — Registration.*—Where the receiver of a lumber manufacturing corporation enters into a contract with an individual to continue the manufacture of lumber, reserving title to the property as a guarantee that the latter will discharge his contractual obligations, and after registration of this contract another corporation is formed, to which the contract rights of the individual have been assigned, and the second corporation becoming insolvent, and a receiver being regularly appointed for it, the lien given by Revisal, sec. 1206, to laborers for an insolvent corporation will not be construed as superior to the rights of the receiver of the first corporation under his prior and registered contract. *Ibid.*

CORPORATIONS—*Continued.*

5. *Corporations—Certificates—Equitable Owners—Stock Transfer—Receivers.*—A purchaser of certificates of corporate stock at the sale by an administrator of a deceased owner to make assets, and deposited by the purchaser with another as collateral to his note, is the equitable owner, and may maintain a suit for the appointment of a receiver in insolvency proceedings, though the stock has not been transferred on the books of the company from the name of the original owner. *Mitchell v. Realty Co.*, 516.

6. *Corporations—Certificates—Executor's Sale—Title of Purchasers—Devises.*—Where certificates of stock of a deceased owner have been sold by his executor to make assets to pay his debts, the effect of the will upon whether the legatee of the stock thereunder could have acquired it is not material as affecting the rights of the purchaser at the sale. *Ibid.*

7. *Corporations—Majority Interests—Mismanagement—Rights of Minority—Receivers—Equity.*—While ordinarily the remedy for mismanagement of a corporation by its directors should be sought within the corporation, a different rule applies when the acts complained of are done by a majority and controlling interest, which can perpetuate the election of the same directors and manage the corporation for their own benefit; for then the minority stockholders are entitled to resort to a court of equity for relief. *Ibid.*

8. *Corporations—Insolvency—Proof Sufficient.*—In an action by minority stockholders of a corporation to appoint a receiver in dissolution proceedings, it is unnecessary to establish a state of absolute and irremediable insolvency, under our statute; but it is sufficient to show that the majority in control are using the assets for their own benefit, receiving salaries, contrary to the provisions of the charter, when none are earned; investing corporate assets in enterprises of doubtful solvency controlled by them, and generally that the company is practically insolvent, and nothing can save it from mismanagement except the appointment of a receiver. *Ibid.*

9. *Corporations—Receivers—Court's Discretion—Appeal and Error—Practice.*—The selection of a receiver for an insolvent corporation is a matter largely in the discretion of the trial judge, and will not generally be reviewed on appeal unless this discretionary power has been greatly abused; and though the practice of appointing the plaintiff's attorney as such receiver is not commended, he will not be removed, as a matter of law, on appeal, though, as any other receiver, he may be removed upon application to the proper judge of the Superior Court. *Fisher v. Trust Co.*, 138 N. C., 102, cited and approved. *Ibid.*

10. *Corporations—Torts—Contracts—Injured Party—Diminution of Damages.*—In an action to recover damages for the negligent breach of a duty of a *quasi* public-service corporation it is necessary that the injury complained of shall have been the proximate cause of the negligence alleged; and where a contract of this character, relating to a public duty, has been broken by such corporations or tort committed by it, it is incumbent upon the injured party to do what he can to reduce or lessen the damage, and such damages as are reasonably incident to his own default in this respect will ordinarily be considered too remote for recovery. *Weeks v. Tel. Co.*, 702.

CORRUPTION. See Officers, 3.

COSTS. See Trusts, 17; Constitutional Law, 2; Criminal Law, 1.

Costs — Successive Defendants — Sale of Interest — Subsequent Party.— Where it appears, in an action involving the title to lands, that the defendant has since then sold his interest therein to another, and the latter, at his request, has been made a party defendant, and the plaintiff has succeeded in the suit, it is proper, in taxing the costs, to tax the one later made defendant with the cost incurred subsequent to his becoming a party, as between the defendants; and to tax both parties jointly and severally with the costs, as it affects the plaintiff. *Willis v. Coleman*, 670.

COUNTERCLAIM. See Bills and Notes, 3, 4; Courts, 6; Pleadings, 4, 6.

COUNTIES. See Taxation, 2, 7; Schools, 3.

COUNTY COMMISSIONERS. See Health, 1; Highways.

COURTS. See Appeal and Error, 1, 2, 8, 17, 28, 29, 30, 54; Trusts, 12; Constitutional Law, 2, 9; Evidence, 5; Judgments, 2; Drainage Districts, 2; Process, 1; Torrens Law, 2; Trials, 16; Mechanics' Liens, 2; Corporations, 9; Commerce, 3.

1. *Courts—Jurisdiction—Pleadings—Demands—Good Faith.*—In order to confer jurisdiction on the Superior Court the amount of the demand in the complaint must be sufficient and related to the facts alleged, and follow as a natural and reasonable conclusion from them; and when it appears therefrom that the largest sum recoverable is within the original jurisdiction of a court of a justice of the peace, it is unnecessary that the demand in the jurisdictional amount was made in "good faith," and the action will be dismissed. *Wooten v. Drug Co.*, 64.

2. *Vendor and Purchaser—Jurisdiction—Pleadings—Demands—Contracts —Considerations.*—In an action by an architect to recover the contract price of plans and specifications furnished for a soda fountain, fixtures, etc., and the loss of his commissions for the sale thereof, the complaint alleged that the defendant entered into a written contract to pay $100 for the plans, and in the event of another person selling the fountain, etc., he was to retain the $100; that by a verbal cotemporaneous agreement, the defendant was to notify the plaintiff of the time he would receive the bids and favor him in the purchase of the fixtures, which he failed to do and purchased from another, and that if plaintiff had been so notified he would have met competitive prices and netted $750 in commissions. *Held*, the allegations as to the commissions were too vague and uncertain to be considered, and the alleged verbal agreement was without consideration, leaving the amount of recovery $100, which was not within the jurisdiction of the Superior Court. *Ibid.*

3. *Trusts and Trustees—Equity—Receivers—Parties—Jurisdiction.*—One who has voluntarily subscribed with others to the building of a public road under a certain management, with the effect of creating a trust for the designated purpose, is not a necessary party to a suit in which a receiver is appointed to carry out the trust, and his presence or absence does not present a jurisdictional question. *Rousseau v. Call*, 174.

4. *Judgments—Courts—Foreign Jurisdiction—Fraud.*—The fraud in procuring a judgment in another State, which judgment the courts of this State will vitiate and set aside, must have been of such char-

COURTS—*Continued.*

acter as to have rendered defenses unavailable to the defendant in that action, and the judgment will not be disturbed when it appears that the elements of fraud relied on to set it aside were interposed and relied on in the former action, and all matters relating thereto were embraced within the scope of the former trial and therein determined and adjudicated. *Williamson v. Jerome*, 215.

5. *Same—Evidence—Nonsuit.*—In an action to set aside a judgment rendered in a foreign jurisdiction for fraud, the evidence tended only to show that the funds of defendants' bank were attached in New York by the judgment creditor under allegation that the bank was a party defendant in that action; that the plaintiffs herein voluntarily went to New York, entered an appearance in the action there, and unsuccessfully resisted judgment; that upon answer filed the action against the bank was dismissed, and that no funds of the present plaintiffs were attached in the former action. *Held*, that by entering an appearance in that action the plaintiffs voluntarily submitted themselves to the jurisdiction of the court, which they were not required to do in defense of their rights, and there being no evidence of fraud in the procurement of the judgment, a judgment of nonsuit in the present action was properly entered. *Ibid.*

6. *Pleadings—Courts—Striking Out Pleadings—Counterclaim—Demurrer.*—The practice of the court in striking out the answer or other pleadings, or a part of it, is unusual in our court, and in the case the part of the answer stricken out being the pleading, or an attempt to plead a counterclaim, the motion on appeal is treated as a demurrer *ore tenus* to it, upon the ground that it fails to state a valid counterclaim. *Bank v. Hill*, 235.

7. *Courts—Continuance of Case—Discretionary Powers—Appeal and Error.*—The continuance of a case is within the discretion of the trial judge, and will not be reviewed on appeal when no abuse thereof is made to appear. *Massey v. R. R.*, 245.

8. *Statutes—Constitutional Law—Power of Courts.*—The question as to whether the Legislature has exceeded its constitutional power by arbitrarily interfering with private business or imposing unusual and unnecessary restrictions upon lawful occupations is for the determination of the courts. *State v. Lipkin*, 266.

9. *Statutes, Declaratory—Vested Rights—Constitutional Law—Courts.*—Declaratory laws cannot deprive a citizen of his vested rights in property by changing the rule of construction as to preëxisting laws; and where the legislative construction is erroneous and law unconstitutional, the courts will so declare. *State v. Haynie*, 278.

10. *Courts—Judgment Suspended—Sentence Pronounced—"Good Behavior."*—Where judgment against defendant is suspended in a criminal action and continued from term to term of court under order that the defendant then appear for the purpose of showing "good behavior," it is not necessary in subsequently pronouncing judgment that the defendant be again guilty of the offense of which he had been convicted, the requirement of good behavior being that he demean himself as a good citizen and show himself worthy of judicial clemency. *State v. Johnson*, 311.

11. *Court's Discretion—Verdict Set Aside.*—The discretionary power of the Superior Court judge to set aside a verdict of the jury is not reviewable on appeal, in the absence of his abuse of this discretion. *Riley v. Stone*, 421.

COURTS—*Continued.*

12. *Trials—Verdict—Nonsuit—Court's Discretion—Power of Courts—Interpretation of Statutes.*—A motion to dismiss an action after verdict can only be granted for lack of jurisdiction or that the complaint did not state a cause of action; and the authority of the court to grant an involuntary nonsuit, upon motion made after the plaintiff has introduced his evidence and renewed after the defendant's evidence is in, resting entirely by statute, Revisal, sec. 539, the trial court is without authority, after verdict, to further consider the defendant's motion for nonsuit, made under the statute, and allow it. *Ibid.*

13. *Court's Discretion—New Trial—Verdict—Nonsuit—Courts.*—An order of the court setting aside a verdict in his discretion upon motion that it is against the weight of evidence is in conflict with his further sustaining a motion to nonsuit the plaintiff upon the evidence, Revisal, sec. 539; for in the latter instance he necessarily acts upon the ground that there is no evidence, and where the verdict has been set aside in the court's discretion, and a nonsuit granted after verdict, the latter is erroneous, and the cause will stand for a new trial. *Ibid.*

14. *Courts, Special—Legislative Powers—Constitutional Law.*—Section 27, Article IV of our Constitution, should be construed with sections 12 and 14 thereof, and the latter sections modify the first named so as to authorize and empower the Legislature to establish special courts in cities and towns and confer jurisdiction upon them without regard to its provisions and limitations. *Oil Co. v. Grocery Co.*, 521.

15. *Same—Process to Other Counties—Justices of the Peace—Statutes.*—An act establishing the County Court of Wilson County declared the same to be a court of record, provided for an official seal for the court and for a judge and solicitor, each to hold office for stated terms at specified salaries, and to take oaths similar to such positions in the Superior Courts; and conferred concurrent jurisdiction with the Superior Courts and justices of the peace in certain criminal and civil matters; and that process issue out of said county under its seal "as is now provided by law in cases of processes issuing from the Superior Court." *Held*, civil processes issuing from the court, prior to chapter 11, Laws of 1915, are valid when issued to other counties, and when falling within the jurisdiction conferred, though the matter involved, in civil actions, falls within the concurrent jurisdiction of justices of the peace, upon whom such jurisdiction has not been conferred, except where one of several defendants resides in the county. Revisal, sec. 1447, has no application. *Ibid.*

16. *Courts—Terms—Motions—Notice—Pleadings — Amendments.*— Parties to an action are presumed to take notice of motions made therein at regular terms of the court; and actual notice of a motion to amend a pleading thus made is not required to be given the adverse party. Hence when an amendment is permitted by the court, on motion of a party, at the term set for the hearing of the action, it is not required that the adverse party should have had actual knowledge thereof, for sush knowledge is implied. *Hardware Co. v. Banking Co.*, 244.

CREDITORS' BILL. See Bills and Notes, 12.

CRIMINAL LAW. See Larceny, 1; Sheriffs, 1; Adultery, 3; Affray, 1, 2, 3, 4; Appeal and Error, 24; Indictment, 1, 4; Intoxicating Liquors, 5; Master and Servant, 19; Physicians, 1; Statutes, 3.

1. *Criminal Law — Frivolous Prosecution—Prosecutors—Costs—Notice—Constitutional Law—Statutes.*—It is necessary for the trial court, in order to adjudge the prosecution of a criminal action to be frivolous and malicious and tax the costs against the prosecutors who have employed attorneys to assist the solicitor, to give the prosecutors notice of such action and hear the matter according to the "law of the land." Revisal, sec. 1295, section 17 of the Bill of Rights, N. C. Const. *State v. Collins*, 323.

2. *Criminal Law—Concealed Weapons—"His Own Premises"—Interpretation of Statutes.*—A superintendent or overseer of a department of a cotton mill, in this case a carding room, is not, while therein, "on his premises," within the meaning of Revisal, sec. 3708, prohibiting the carrying of concealed weapons; and where such person has carried a pistol concealed on premises of this character, especially when he does so in anticipation of a difficulty with another employee therein, he is indictable for the offense prohibited by the statute. *State v. Bridgers*, 309.

DAMAGES. See Carriers of Passengers, 3; Libel and Slander, 1; Master and Servant, 16, 28; Railroads, 7; Trials, 9; Contracts, 14, 16; Appeal and Error, 38, 47; Municipal Corporations; Commerce, 1.

Fire Companies — Fire Damages — Measure of Damages — Insurance — Appeal and Error.—Where the defendant water company is liable for its negligence in failing to supply water to extinguish the burning of plaintiff's store and stock of merchandise therein, the former insured in a certain sum and the latter not insured, it is reversible error for the trial judge to instruct the jury to deduct the amount of the insurance from the total loss, when the effect may be to deny the plaintiff any recovery for damages sustained by reason of his uninsured stock of goods. *Morton v. Water Co.*, 468.

DANGEROUS APPLIANCES. See Master and Servant, 12; Trials, 8.

DEADLY WEAPONS. See Homicide, 1.

DEBTOR AND CREDITOR. See Principal and Surety.

DECEASED. See Vendor and Purchaser, 13.

DECLARATIONS. See Attorney and Client; Deeds, 6, 7, 9, 13, 14, 15; Evidence; Wills, 11; Telegraphs, 13.

DEDICATION. See Easements, 1, 4; Deeds, 18, 19, 39; Highways, 2.

DEEDS. See Contracts, 10, 15; Judgments, 7; Landlord and Tenant, 2; Pleadings, 3; Possession, 1, 2; Principal and Surety, 1; Public Lands, 1; Taxation, 4; Trusts, 1, 3; Trespass, 2; Equity, 1; Estates, 1; Husband and Wife, 1, 3, 4; Wills, 14.

1. *Deeds and Conveyances—Contracts—Interpretation—Intent—Timber—Right to Sell Reserved.*—An express written agreement made between the owner of lands whereon timber is growing, and another, whereby the latter was to cut the timber, with certain provisions as to a division of profits, etc., containing the further provision that if the owner "shall sell and convey any and all of the lands herein

DEEDS—*Continued.*

mentioned and described this contract shall be null and void as to the part sold and conveyed," must be so construed as to effectuate the intention of the parties as gathered from the language employed, and admits only of the interpretation that the owner may at any time during the life of the contract sell off portions of the land, though after the other contracting party had begun to cut the timber. *Finger v. Goode*, 72.

2. *Deeds and Conveyances—Conditions Subsequent—Interpretation.*—If it be doubtful whether a clause in a deed is a covenant or a condition, the courts will incline against the latter construction, for a covenant is far preferable to the tenant; yet deeds are nevertheless construed to effectuate the intention of the parties where construction is permissible, and where the intention to create an estate upon condition is clear, the law will so construe the deed. *Huntley v. McBrayer*, 75.

3. *Same.*—Where the conditions expressed in a conveyance of land is not necessarily required to precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate, or if from the nature of the act to be performed and the time required for its performance it is evidently the intention of the parties that the estate shall vest, and that the grantee perform the act after taking possession, then the condition is subsequent. *Ibid.*

4. *Deeds and Conveyances—Support of Grantor—Conditions Subsequent.* A conveyance of land made in consideration of support and maintenance so long as the grantor shall live, and if the grantee should fail to comply with his part of the agreement, then the deed to be void and of no effect, with provision that the grantor remain in possession for his life, is construed to be made upon condition subsequent. *Ibid.*

5. *Same—Termination of Estate—Evidence.*—Where a deed made upon consideration of support of the grantor is sought to be terminated upon the ground that the condition subsequent had not been performed by the grantee, it must clearly appear that there has been a substantial failure by the grantee to perform his covenant; and evidence that some demand not stated was made by the grantor upon the grantee is insufficient. *Ibid.*

6. *Deeds and Conveyances—Evidence—Declarations—Surveys.*—Declarations of a person, in his own interest at the time, as to the location of a divisional line or boundary of lands are incompetent evidence as to those claiming under him, and in this case it is held that certain other of his declarations concerning that line were properly limited by the court to what was actually done on the survey. *Lumber Co. v. Lumber Co.*, 81.

7. *Deeds and Conveyances—Evidence—Declarations — Interests.*—Where the declarant has parted with his interest in lands, what he may thereafter say about the lines and boundaries cannot be used against those claiming under him, irrespective of the question of *litem motam*. *Ibid.*

8. *Evidence—Deeds and Conveyances—Grants—Copies—Lost Originals—Search—Interpretation of Statutes.*—A duly certified copy of the registry of a grant is competent evidence without the necessity of accounting for the nonproduction of the original (Revisal, sec. 988),

DEEDS—*Continued.*

and if by affidavit a material variance between the copy and the original in such entry is suggested, the court by rule or order may require the production of the original of such deed, in which case it must be produced or its absence duly accounted for according to the course and practice of the courts, which was sufficiently done in this case. *Ibid.*

9. *Deeds and Conveyances—Corners—Declarations—Evidence.*—Where the location of a certain corner of lands is relevant and material to the controversy, testimony as to a conversation between a witness and others in relation thereto was properly excluded where the witness could not name those present at the time or give the substance of what was said, but only the impression on him. *Ibid.*

10. *Deeds and Conveyances—Descriptions—Calls—Adjoining Tracts—Interpretation.*—Where the *locus in quo* in an action of trespass involving title to lands is made to depend upon its location within the boundaries of a certain deed introduced in evidence, giving a beginning point, with further description, and then to J. H.'s line, "thence with his line to where it meets with T. H.'s line, thence with his line around to the mouth of the stillhouse branch, where it enters into Buffalo Creek," etc., and J. H. and T. H. are the adjoining owners at the places indicated, and there is no dispute as to the calls up to that point: *Held*, the legal method of locating the deed is to run directly from the last known point of the H. lines to the next call in the deed that was fixed and established, towit, the "mouth of the still-house branch." *Boyden v. Hagaman*, 199.

11. *Deeds and Conveyances—Description—Adjoining Lines—"Fixed and Established."*—The doctrine requiring that lines of another tract called for in a conveyance of lands shall be fixed and established with assured precision is one that is, at times, called for where there is conflict in a deed between such calls and that by course and distance, and does not always or necessarily prevail where such conflict is not presented. *Ibid.*

12. *Same—"Run and Marked"—Interpretation.*—The rule that lines of adjoining tracts called for in a conveyance of lands shall be fixed and established does not necessarily require that these lines must have been "run and marked"; but if they may be fixed and established in accordance with the recognized rules of survey and location of deeds they come within the meaning of the rule and so fill the description. *Ibid.*

13. *Deeds and Conveyances—Boundaries—Declarations—Evidence.*—The admission in evidence of the declarations of a deceased owner of lands as to the location of the boundaries of his deed is not objectionable as contradicting the boundaries given in the deed, when the court has explicitly charged the jury that they could in no wise change the description as it therein appeared, and were only relevant on the question of boundary and to the extent they tended to fix the location of the lines called for. *Ibid.*

14. *Deeds and Conveyances — Declarations — Possession — Evidence — Against Interest.*—The declarations of a deceased owner of lands while in possession, defining the limits of his claim, are competent as evidence; and especially so when they are made against his interest. *Ibid.*

DEEDS—*Continued.*

15. *Deeds and Conveyances—Trustee—Declarations—Evidence.*—The general rule that the declarations of a trustee are not competent as against the interest of the beneficiary does not apply when made in the course and performance of declarant's duties as trustee, and when he was in present possession and control of the lands, asserting his ownership under a deed. *Ibid.*

16. *Deeds and Conveyances—Defective Registration—Title—Connecting Links—Evidence.*—A power of attorney executed in another State, not passed upon by the clerk of the court, but placed upon the registration books without his authority or order, is improperly registered (Revisal, sec. 999), and affords no evidence of title in an action to recover lands when relied upon by a party as a connecting link in his chain of title, for the statute requires that deeds or other instruments shall be properly probated by the clerk to authorize registration. *Buchanan v. Hedden*, 222.

17. *Deeds and Conveyances—Same Source of Title—Color—Limitation of Actions.*—An unregistered deed is not color of title when the parties to an action for the recovery of land are claiming under the same source. *Ibid.*

18. *Municipal Corporations—Deeds and Conveyances—Streets—Plats—Dedication—Innocent Purchasers.*—Where the owner of lands plats the same into lots, streets, alleys, and parks, and in his deeds to purchasers conveys some of the lots with reference to the plats, he is ordinarily estopped, upon equitable principles, to deny a dedication of the streets, alleys, etc., or an easement therein, to the use of his grantees and the public; but when the deeds are not registered, this principle does not apply to subsequent purchasers for value of other lots contained in the plat, without actual or constructive notice of the dedication of the streets, alleys, etc., for then the equities are equal, and the maxim, "He who asks equity must do equity," also applies. *Sexton v. Elizabeth City*, 385.

19. *Municipal Corporations—Deeds and Conveyances—Streets—Dedication—Unregistered Plat—Notice—Registration.*—Where lots were sold in accordance with a plat of land showing streets, alleys, parks, etc., and the deeds therefor refer to the plat in the description of the lots, and the plat or map is duly recorded, but the deeds are not; and thereafter another plat is made of the same lands, without showing thereon a certain street or alley, and other lots are sold including it, and accordingly described and conveyed, the registration of the plat, not being required or allowed by our registration laws, does not give constructive notice to innocent purchasers for value under the second plat; and there being nothing on the lands themselves to indicate that there is an alley or street at the place where one is shown on the first plat, and no evidence of actual notice to those who purchased according to the second plat, they acquire, under equitable principles, the title to their lots according to the description in their deeds. *Ibid.*

20. *Equity—Estoppel—Deeds and Conveyances—Registration—Interpretation of Statutes.*—This equitable doctrine of estoppel has no application to an innocent purchaser of lands for a valuable consideration, where the party setting up the estoppel under his deed has not had the latter recorded; for no notice, however full or formal, will, under our statute, supply the place of registration. Revisal, sec. 980. *Ibid.*

DEEDS—*Continued.*

21. *Municipal Corporations—Deeds and Conveyances—Notice—Innocent Purchasers.*—Where an incorporated town enters upon streets or alleys according to a certain plat of lands, showing them, made by the owner, and takes them for public use, and it appears that a portion of the streets or alleys has been included in lots subsequently sold and conveyed to purchasers for value without actual or constructive notice, the act of the town, where there has been no condemnation, is one of trespass, entitling the purchasers to damages. *Ibid.*

22. *Deeds and Conveyances—Title—Common Source—Paramount Title—Evidence.*—Where there is evidence tending to show that the parties to the action claim title to the land from a common source, one of them may prove an outstanding paramount title acquired by himself; and where he has offered in evidence a conveyance from the State Board of Education to State's lands, and connected himself therewith, this may be rendered nugatory by his adversary showing that the land had previously been granted by the State to another. *Weston v. Lumber Co.*, 398.

23. *Deeds and Conveyances—Partition—Title—Estoppel—Evidence.*—The plaintiff's title to the lands in controversy further depending upon the defendant's being estopped to deny his title by a judgment in proceedings for partition, wherein the title to the lands was not involved (162 N. C., 165), it is held that a judgment of nonsuit was properly entered in the lower court under the authority of the former opinion, which position is further strengthened in this appeal tending to show they had no title at the time of the proceedings. *Ibid.*

24. *Deeds and Conveyances—Judgments—Executors and Administrators—Sales—Devisee—Sci. Fa.*—A deed in plaintiff's chain of title upon which he relies which recites, in effect, that it was made under a *fieri facias* issued upon a judgment recovered against an executor of the deceased owner, and that the lands sold were in the hands of a devisee, is fatally defective, there being no recital therein of a *sci. fa.* or that any notice or other process issued to the devisee, or that any judgment was rendered condemning the lands; for the devisee is entitled to his day in court to contest the plea of fully administered, etc., and thereby relieve his land. *Ibid.*

25. *Deeds and Conveyances—Chain of Title—Descriptions—Evidence.*—A deed in the chain of title claimed by a party in this action to recover lands is ineffectual for the purpose when it appears from the description therein that it does not purport to convey the *locus in quo*. *Ibid.*

26. *Deeds and Conveyances—Mental Capacity—Undue Influence—Trials—Questions for Jury.*—Where in an action to set aside a deed for mental incapacity of the grantor or undue influence exercised upon him, the evidence shows mental weakness on his part, accompanied by other inequitable incidents, such as undue influence, great ignorance and want of advice, or inadequacy of consideration, it presents a case where equity will interfere and grant either affirmative or defensive relief; and if there is evidence tending to establish these facts, though the evidence be conflicting, the issues, as to fraud or undue influence, should be submitted to the jury. *Lamb v. Perry*, 437.

27. *Deeds and Conveyances—Mental Incapacity—Requisites.*—In order that a testator should have mental capacity sufficient to make a will,

DEEDS—*Continued.*

it is not required that he be capable of acting wisely or discreetly, but simply that he have sufficient ability to understand the nature of his act, its scope and effect, or its consequences, and to know what he is about. *Ibid.*

28. *Same — Undue Influence—Evidence—Questions for Jury.*—Where the evidence tends to show bodily and mental weakness of the grantor in a deed sought to be set aside, inadequacy of consideration therefor, especially when it is gross, and the mental superiority of the grantee, it is sufficient for the jury to draw an inference therefrom of fraud, or undue influence, and should be submitted to the jury under conflicting evidence, as to whether fraud or undue influence has been practiced in obtaining the instrument. *Ibid.*

29. *Same—Trials—Burden of Proof.*—Fraud in the procurement of a deed for mental weakness of the grantor, and undue influence upon him, must be established by the party alleging it to the satisfaction of the jury, by a preponderance of the evidence, but strong, cogent and convincing proof is not required. *Ibid.*

30. *Deeds and Conveyances—Lands—Implied Warranty.*—In the absence of fraud or mistake in a conveyance of land, there is no implied covenant or warranty of title, either at law or in equity, and the grantee has no remedy on the ground of failure of title, unless a warranty is expressed in the deed or can reasonably be inferred from a fair construction thereof. *Pritchard v. Steamboat Co.*, 457.

31. *Same—Wharves—Expressio Unius.*—When a conveyance of a steamboat line expressly covenants for a good title, or warrants the title only as to liens or encumbrances on steamers, it excludes the idea that the wharves, landings, etc., were intended to be included therein, upon the maxim, *Expressio unius est exclusio alterius. Ibid.*

32. *Deeds and Conveyances—Wharves—Fixtures—Implied Warranty.*—Wharves, which are used in connection with a line of steamboats, and built upon the riparian lands, or banks of the stream, or annexed thereto, and manifestly intended to become a part thereof, will not be considered as personal property, so as to imply a warranty of the title in a conveyance of the steamboat line, as in sales of such property, although the vendee may not have acquired a fee-simple absolute therein, but only a base, qualified, or determinable fee. *Ibid.*

33. *Same—Defective Title — Steamboats — Deposit of Liens—Contracts.*—Where a steamboat company conveys to another all of its property, including its boats, landings, wharves, etc., and deposits with a trustee a certain sum of money to discharge liens upon the steamers alone, without any stipulation that any part of the fund should be applied as compensation for defects in the title of the other property conveyed, the conveyance itself clearly forbids that any of the funds, so deposited, should be used for purposes not specified, or to compensate the purchaser for any defect in the title to one of the wharves conveyed. *Ibid.*

34. *Deeds and Conveyances — Conditions Subsequent — Restraint of Marriage.*—Where a deed to land is clearly and unambiguously expressed, and conveys it to another, but upon a condition subsequent in general restraint of marriage, the condition, as a general rule, will be disregarded; and a conveyance of land to C., with full covenants of warranty, but if C. should marry, the property shall revert to the

DEEDS—*Continued.*

grantor, is construed to be in fee simple, the condition annexed being in general restraint of marriage, and therefore void. *Miller's case*, 159 N. C., 123, cited and distinguished. *Gard v. Mason*, 507.

35. *Deeds and Conveyances—Tax Deeds—Color of Title—Disseizin—Adverse Possession—Declarations—Evidence.*—Where the grantee under a sheriff's deed for taxes relies upon his deed as color of title, and it appears that he has lived on the lands with the original owner, since deceased, cultivating them, within the seven years period, evidence tending to show declarations of the original owner, made since the tax deed, to the effect that the lands belonged to the grantee therein, who was permitting him to remain there until his death, and that he could not sell the timber growing thereon for that reason, is sufficient to show disseizin of the original owner of the tax title, presenting a question for the determination of the jury; and in this case it is held that the testimony of the declarations of the original owner was sufficient evidence of acknowledgment of the tax title from the date of the tax deed. *Fowle v. Warren*, 524.

36. *Deeds and Conveyances—Pleadings—Equity—Specific Performance—Decrees.*—Where in an action to enforce a specific performance of an option on land it appears from the pleadings and admissions of the parties that the defendant had agreed to include within the terms of the option a certain other tract of land, which was omitted by their mutual mistake, that the entire consideration had been paid, including the execution of notes for the deferred payments to be made on the purchase price of the lands, with mortgage to secure their payment, it is held that a decree was properly entered in the court below that the vendor convey to the purchaser the tract thus omitted, and that the latter should execute a mortgage thereon as further security for the notes given for the purchase price; and in default thereof the decree should be registered as a conveyance in accordance with the provisions of the statute. *Bryan v. Canady*, 579.

37. *Deeds and Conveyances—Pleadings—Equity—Specific Performance—Allegations—Prayers for Relief—Issues.*—In a suit for specific performance of an option to convey land, the complaint alleging an omission by mutual mistake of the parties of one of the several tracts intended to be conveyed by option, which the answer denied: *Held*, that the issue thus raised was subsequently rendered immaterial by the defendant admitting in open court that he had executed the option alleged, and that it included the tract in question, which had not been described in the conveyance. *Ibid.*

38. *Deeds and Conveyances—Boundaries—Trials—Questions of Law—Questions for Jury.*—What is the boundary of a tract of land is a question of law in construing a conveyance thereof; but the location of the boundary is a question of fact. *Sugg v. Greenville*, 606.

39. *Deeds and Conveyances—Municipal Corporations—Streets—Dedication—Acceptance—Cities and Towns.*—The acceptance of land offered by the private owner thereof for street purposes is in the discretion of the proper municipal authorities, and it is necessary to be had before such dedication can become effectual and binding, though it may be either express or implied. *Ibid.*

40. *Same—Discretionary Powers—Width of Streets.*—The proper municipal authorities in extending a street of a city or town are vested with the discretionary power to determine the width of the street as

DEEDS—*Continued.*

thus extended, and there is no requirement that the width of the street as extended shall be the same width or conform to the lateral lines of the original street, or those of its further extension. *Ibid.*

41. *Deeds and Conveyances — Descriptions — Boundaries — Ambiguity — Trials—Questions for Jury.*—Where a conveyance of land calls for the eastern line of a certain street of a town, extended through its intersection with F Street, and there is conflicting evidence as to whether the physical or actual boundary had been established and was used at the time and was a more western line than that of the theoretical extension, had it been made on a straight line through F Street, the *locus in quo* lying below the street, it raises a question for the jury to decide as to which of the two lines the parties intended when the conveyance was made, when the language of the conveyance leaves the matter in doubt. *Ibid.*

42. *Deeds and Conveyances—Interpretation—Meaningless Words.*—Where a street is called for as a boundary to a tract of land conveyed, and the location of the eastern line of the street is left in doubt, and it further appears that another call in the description is for the street "extended" or thence with the street extended through its intersection with F Street, the theoretical extension of the street through F Street in a straight line on that side thereof will not necessarily control, there being evidence tending to establish a different line actually adopted and used by the municipality, and under the facts in this case it is held that the words "through its intersection with F Street" should be read as if written "to" the said intersection, as that was clearly meant. *Ibid.*

43. *Deeds and Conveyances—Interpretation—Former Deeds—References—Intent—Evidence.*—Where the description in a conveyance of lands calls for one of its boundaries as a certain street, the line of which is left uncertain, and reference is made therein to a prior conveyance in the chain of title, the courts in construing the deed will consider it in its entirety, and give reasonable effect to all its parts, the circumstances surrrounding the parties at the time, and other relevant matters and where the reference to the former deed sheds light upon the intention of the parties, it will be considered in interpreting the deed in question in order to ascertain this intent. *Ibid.*

44. *Deeds and Conveyances — Actions — Grantor and Grantee—Parties.*—Where a grantor and his grantee bring an action against a municipality to recover damages for the unlawful appropriation of land for street purposes, if the former has retained title to the *locus in quo* in himself, he would have the right of independent or separate action to recover it, and if otherwise, the latter may maintain an independent or separate action for it, and in either event the one would not be a necessary party to the other's action. *Ibid.*

45. *Same—Mutual Mistake—Pleadings—Amendments.*—The grantor is a necessary party to the grantee's action against another to recover lands when the latter claims that the *locus in quo* was intended to be included in the conveyance to him and was omitted by mutual mistake, and asks for a correction and for a recovery of the land in that aspect; and in this case it is held that the grantee may apply for leave of the court to amend his complaint, so as to make the proper allegations of mistake so that the deed may be reformed. *Ibid.*

DEEDS—*Continued.*

46. *Deeds and Conveyances—Timber Deeds—Extension Period—Terms—Successive Payments—Payment for Period.*—Ordinarily the provision which allows an extension of time for cutting timber must be complied with by the grantee in accordance with the terms of the conveyance, in order that he may take advantage thereof; but where a time for cutting and removing has been fixed by the conveyance, with provision that the grantee may extend the time from year to year for five years upon giving notice and paying a certain fixed sum each year in advance, and it is admitted that before the expiration of the original period for cutting the grantee notified the grantor that he would avail himself of the full extension period of five years and tendered the sum specified, covering the full extension period, which the grantor refused, it is *Held*, that the notice and prepayment required of the grantee for each successive year was inserted for the grantee's advantage, and that notice and tender of payment made in apt time for the full five years period was sufficient. *Bangert v. Lumber Co.*, 628.

47. *Deeds and Conveyances—Timber — Extension Periods—Notice—Time and Place of Payment—Tender of Payment.*—No notice is required to be given by the grantees of standing timber to cut the timber from the lands during the extension period allowed in the conveyance, when by the terms thereof no previous notice is required, but that the grantees shall have the privilege of cutting and carrying off the said timber within ten years, with an additional term of five years, if they shall pay annually during the additional term, at the grantee's office in N., on the first Monday in February of each year, a sum equal to 8 per cent of the original purchase price; nor will the grantee's right to the extension period be forfeited when it is shown that they have been able, ready and willing to pay the interest at all times when called upon, and that the grantor has not done so, though the grantees have continuously maintained their office at the place designated in the deed. *Taylor v. Munger*, 727.

DEMURRER. See Courts, 6; Highways, 4; Torts, 1; Wills, 14.

DEPOSITIONS. See Evidence, 2.

DIRECTING VERDICT. See Trials, 7.

DISCRETION. See Courts.

DIVIDENDS. See Wills, 13.

DOGS. See Taxation, 7.

DRAINAGE DISTRICTS.

1. *Drainage Districts — Interpretation of Statutes — Water and Watercourses—Reports of Viewers—Conformity—Drainage Commissioners.* Where a drainage district has been laid out in accordance with the requirements of the Drainage Act, and the final report has been filed and recorded, provision is made for the selection of a board of drainage commissioners, etc., who are charged with the duties of carrying out, substantially, the plans and specifications of the report as recorded, their powers being largely ministerial in character, to make out the assessment rolls constituting a lien on the property, as in case of tax lists, observing the classifications and ratio of assessments de-

termined upon by the board of viewers; and the modification made by section 4 of the act contemplates only such minor changes of detail as may occur in carrying out the plans, etc., specified in the final report, and not a substantial departure therefrom. *Griffin v. Comrs.*, 643.

2. *Same—Courts—Rights of Landowners—Laches.*—The courts, in proper instances, have the power to interfere and stay amounts assessed against the owner of lands within an established drainage district, when it appears that the commissioners, in carrying out the ministerial duties imposed on them, endeavor to collect from him a sum in excess of their own assessment, or that they had made out these rolls in utter disregard to the classifications and ratio of assessments established by the final report, or they had made such changes in the plans and specifications thereof as to exceed their powers and work substantial wrong and hardship upon a landowner, if he is not guilty of laches and has not unduly delayed asserting his rights. *Ibid.*

3. *Drainage Districts—Interpretation of Statutes—Reports—Objections—Landowners—Expectations.*—Where a drainage district has been duly laid off in conformity with the statute, and a landowner therein has not excepted to either the preliminary or final report, he may not, after the appointment of the commissioners, be heard to complain that the benefits he is to receive are not as great as those he had contemplated. *Ibid.*

4. *Same — Bond Issues — Injunction — Rights Against Commissioners.*—Where a drainage district has been fully and lawfully established in accordance with the statute, and the commissioners duly appointed and bonds issued in furtherance of the scheme, an injunction restraining the collection of the assessment against the landowners therein, at the suit of one of them, will not issue, as against the interest of the holder of the bonds, unless it clearly appears that the commissioners have substantially departed, to the injury of the claimant, from the scheme set forth in the final report of the viewers, etc.; and it appearing in this case that such has not been done, the restraining order is properly dissolved, and the further order that the plaintiff may proceed in his action against the commissioners is approved. *Ibid.*

5. *Drainage Districts — Interpretation of Statutes — Reports — Record—Notice—Objections—Laches.*—Upon the filing of the final report by the viewers, etc., in a proceeding to establish a drainage district under the provisions of the statute, a record is required by the statute to be kept in a book for the purpose, giving all interested in the proceedings notice of all that has been done materially affecting them; and when they have failed to make objection within three years, *semble*, they have lost their right to object, by the delay. *Ibid.*

6. *Drainage — Waters — Condemnation — Compensation — Constitutional Law.*—While the importance of our drainage laws are fully recognized as affecting the interest of the public to the extent that valid power of condemnation may be conferred by statute upon corporations or companies engaged in this work, the exercise of this power, being a taking of private property, should be safeguarded, and adequate provision made for compensating the private owners whose lands are taken against their will, or upon which damages are in-

DRAINAGE DISTRICTS—*Continued.*

flicted in the prosecution of the work, and unless this is done, the law must be declared invalid. Constitution, Art. I, sec. 1. *Lang v. Development Co.*, 662.

7. *Same—Interpretation of Statutes.*—Chapter 141, Laws of 1915, regulating drainage, provides, among other things, that a majority of landowners or persons owning three-fifths of the land in a given area of "defined swamp or lowland land" may contract with any person, firm or corporation to cut a canal and drain along a proposed route, "whether the owners of said land consented thereto or not," and the contractor shall have the necessary right of way for that purpose and for all things incident thereto through any lands or timber situated within said "swamp or lowland." A lien is given on the lands for the payment of assessments to cover the cost of drainage, etc., and the minority owners are required to pay their proportionate amount of the cost, to be assessed, etc., with no provision for damages beyond the value of the benefits they may receive from the work thus done, or any responsibility placed for the payment of such damages or funds with which to pay them, should they exist. In this respect the statute is unconstitutional and void, as a taking of private property without providing for just compensation to the private owner of the lands, whose consent has not been given. *Ibid.*

DRUGS. See Homicide, 9.

DUE PROCESS. See Constitutional Law; Easements.

EASEMENTS. See Railroads, 2; Statutes, 4.

1. *Easements—Private Ways—Public Use—Dedication—Condemnation.*—A reservation by deed to the grantor of a restricted easement across the lands conveyed, without defining or locating it, and which has not since been located, the grantor and his family going across the lands conveyed whenever they choose, is insufficient proof of an established right of way across the lands, much less of a cartway, and still less of a public way. *State v. Haynie*, 277.

2. *Same—Statutes—Taking of Private Property—Constitutional Law.*—An act of the Legislature which declares private ways, restricted in their use, over the lands of the owner to be public ways, making their obstruction by the owner punishable under the criminal laws, is the taking of private property for a public use without just compensation, and is unconstitutional. *Ibid.*

3. *Same—Due Process—Limitation of Actions.*—A public-local law which shortens the period for the running of the statute of limitations to a time already expired and depriving the owner of lands of his right to stop the public user of a private right of way thereover, and declares the right of way a public one, is unconstitutional in taking the property of the owner without due process of law and in denying him the equal protection of the laws. *Ibid.*

4. *Easements — Dedication—Acceptance—Presumptions—Statutes.*—In order to establish an easement for the public use over the lands of a private owner, there must be a dedication thereof by the owner and an acceptance on the part of the proper authorities, or acts on the part of both which would, expressly or impliedly, amount thereto, or presume a grant, or an acquisition thereof for the public use in some legal and recognized manner. Revisal, sec. 3784. *Ibid.*

ELECTIONS.

Municipal Corporations — Elections — Bond Issues — Statutory Notice— Interpretation of Statutes.—The statutory requirement that notice be given of the opening and closing of places of registration, and that the registration be kept open and accessible for a specified time, are regarded as essentials by the courts in passing upon the validity of bonds to be issued by a municipality for the purpose of constructing a waterworks plant; but where it appears that full notice of the election was given, including a notice therein that there would be a new registration, and that the books were afterwards opened for a time actually sufficient to afford all an opportunity to register, though short of the legal period, and it further appears that the election has been hotly contested by both sides, each of which thoroughly canvassed the voting precincts and extensively advertised the election and registration in the local newspapers and otherwise, resulting in an unusually large vote cast at the election, and there has been given to all a fair and full opportunity to vote; that there has been no fraud, and the election was in all respects free from taint or suspicion, and that no material change in the result of the election could otherwise have been produced if the statute had been strictly complied with, the law, looking to the substance and not so much to the form, will not set aside the expression of the popular will for the issue of bonds, as expressed at the election, and enjoin the execution and sale of the bonds thus approved, because of the failure to keep the registration books open for the full time required by the statute. *Hill v. Skinner*, 405.

ELECTRICITY. See Municipal Corporations, 3; Master and Servant, 1, 2, 3, 4; Trials, 1.

Electricity—Street Railways — Trials — Evidence — Nonsuit.—In an action against an electric railway company to recover damages for an injury alleged negligently to have been inflicted by it upon a 13-year-old boy, the evidence tended only to show that the plaintiff, with other boys, was upon the defendant's railway bridge, placed underneath which, at a distance of 12 inches, ran the defendant's feed wire; that the plaintiff and others were playing on this bridge, had reached down endeavoring to touch the feed wire, and upon being dared by the others to do so, the plaintiff succeeded in touching the wire and received the injury complained of. *Held*, the consequences resulting in the injury could not reasonably have been foreseen by the defendant and affords no evidence of its actionable negligence. *Parker v. R. R.*, 68.

EMINENT DOMAIN. See Railroads, 6.

EMPLOYEES. See Railroads, 6.

EMPLOYER AND EMPLOYEE. See Master and Servant.

ENTRY. See Navigable Waters, 1, 2; Public Lands, 7, 8, 13, 14; Trusts, 6.

EQUITABLE TITLE. See Bills and Notes, 2.

EQUITY. See Corporations, 7; Deeds, 20, 36, 37; Pleadings, 12; Appeal and Error, 53; Injunction, 1; Contracts, 1; Courts, 3; Judgments, 2; Landlord and Tenant, 4; Limitation of Actions, 2.

1. *Equity—Deeds and Conveyances—Fraud.*—Equity will set aside a deed procured by the fraud or undue influence of the grantee, and require

EQUITY—*Continued.*

that he surrender what he has unfairly and unjustly received, with proper deduction for any sum paid out by him, if the specific remedy of rescission, or cancellation, cannot fully and equitably be administered. *Lamb v. Perry*, 437.

2. *Equity—Contracts—Interpretation—Forfeitures.*—Equity does not favor forfeitures or penalties, and will relieve against them when practicable and in the interest of justice; and a court of equity will not be astute to place a construction upon a contract that will cause a forfeiture when another and reasonable construction may be placed upon it and avert such forfeiture. *Bangert v. Lumber Co.*, 628.

3. *Equity—Parol Trusts—Quantum of Proof—Instructions—Trials—Evidence.*—In an action to recover lands, where the defendant holds under a deed formally conveying to him the legal title, and the plaintiff is seeking to correct a mistake in the instrument or annex a condition to it, he is required to make out his claim by clear, strong and convincing proof, the question being one for the jury, with proper instructions from the court. *Glenn v. Glenn*, 729.

ESTATES. See Wills, 1, 2, 3, 5; Deeds, 5; Trusts, 1.

Estates — Wills — Contingent Interests — Deeds and Conveyances—Warrants—Consideration.—Where lands are devised to P. and M., but should either die without children, then to the survivor, and M. has died without children, P. taking the whole estate, defeasible in the event of her death without children, whereupon it would go to certain ultimate devisees: *Held*, a conveyance to P. from such ultimate known devisees would be valid, when made upon a good consideration, and will conclude all who must claim under the grantors, even though the conveyance is without warranty or valuable consideration. *Hobgood v. Hobgood*, 485.

ESTOPPEL. See Bills and Notes, 4; Judgments, 1, 6, 7, 8, 12, 16; Landlord and Tenant, 2; Pleadings, 3; Wills, 3, 14; Deeds, 20, 23; Trusts, 14; Arbitration and Award, 3.

EVIDENCE. See Appeal and Error, 2, 4, 7, 9, 11, 22, 23, 24, 28, 32, 37, 40, 46, 56; Contracts, 6, 7, 11, 14, 17; Deeds, 3, 4, 5, 6, 7, 8, 9, 13, 14, 35; Insurance, Life, 2, 3; Judgments, 8, 17, 23; Judicial Sales, 2; Master and Servant, 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 17, 18, 27; Removal of Causes, 1; Trials, 1, 2, 4, 8, 11, 12, 13, 14; Wills, 8, 11; Carriers of Goods, 1, 4; Carriers of Passengers, 3, 4; Equity, 3; Issues, 1; Pleadings, 1, 3; Mechanics' Liens, 2; Railroads, 12, 14, 16, 17, 20; Telegraphs, 3, 5, 6, 8, 11, 13; Vendor and Purchaser, 1, 2, 7, 8, 11, 13, 14; Possession, 2; Principal and Agent, 1, 2; Principal and Surety, 1; Public Lands, 1, 5, 6; Railroads, 9; Trusts, 2; Witnesses, 1; Homicide, 1, 6, 7, 8; Larceny, 1; Trespass, 2; Adultery, 2, 3; Attorney and Client, 1; Bills and Notes, 5; Courts, 5; Electricity, 1; Libel and Slander, 1, 3.

1. *Negligence—Evidence—Trials—Burden of Proof.*—The employees of a railroad company engaged in burning off its right of way left one of their number in charge and proceeded to another place thereon for the same purpose. There was evidence tending to show that the plaintiff in this action had a pile of lumber at the place of the firing, and that the employee remaining to look after the fire, or to see that it did no damage, went away, leaving no one at all at the place, and soon thereafter fire broke out in the plaintiff's lumber and damaged

EVIDENCE—*Continued.*

it. *Held*, sufficient evidence of the defendant's negligence to carry the case to the jury, and the circumstances being wholly within the knowledge of the defendant's agents as to whether they used the care required of them in putting out the fire, the burden of proof was on the defendant in that respect. *Stemmler v. R. R.*, 46.

2. *Evidence — Depositions — Testimony of Witness—Effect.*—Depositions taken in a cause, which have been dstroyed before they were opened and passed upon, are not competent as evidence (Revisal, sec. 1652); nor can a witness testify as to their contents, especially where he is not able to give their substance, but merely the impression they made upon his mind. *Lumber Co. v. Lumber Co.*, 82.

3. *Evidence — Witnesses — Experience — Knowledge—Experts.*—Upon the question of the amount of damage to a cotton mill plant and settlement caused by the acquisition and use of a railroad right of way on the lands, it is competent to show by witnesses, having actual knowledge of the lands and its improvements, the situation, uses, and surroundings of the same, and also their opinions based thereon, and upon their long observation and experience in the same kind of business which is conducted on the premises in question. *R. R. v. Manufacturing Co.*, 156.

4. *Evidence — Unresponsive Answers — Motions.*—Where the witness answers a competent question and testifies further as to incompetent matters, the remedy of the complaining party is to move to strike from the answer the improper evidence. *Huffman v. Lumber Co.*, 259.

5. *Evidence — Dying Declarations — Weight of Evidence—Court's Discretion—Instructions.*—While dying declarations are not made under oath and subject to cross-examination, and should be considered by the jury with a certain amount of caution, the way in which this caution may be expressed, in a charge to the jury, is, to a great extent, left to the discretion of the trial judge, who having properly charged thereon in this case, exception thereto that he had not used the language approved in a certain precedent will not be sustained on appeal. *State v. Kennedy*, 288.

6. *Evidence — Special Detective — Scrutiny and Weight — Instructions—Special Requests—Appeal and Error.*—The testimony of a special detective in an action to convict the defendant of an unlawful sale of intoxicating liquor should be considered by the jury in his relation to the case, his purpose and object, and should be scrutinized and weighed by them accordingly as his interests in the prosecution may appear; and where the judge has accordingly charged, his refusal to give a special request that the testimony of the detective should be scrutinized with unusual caution will not be held erroneous. *State v. Wainscott*, 379.

7. *Water Companies—Fire Damages — Evidence — Comparative Values—Appeal and Error—Municipal Corporations.*—Where a water company negligently fails in its duty to supply water to extinguish the burning of the plaintiff's house, it is reversible error, to the plaintiff's prejudice, to admit evidence of the comparative value of the house with cost of one he has subsequently erected, and to instruct the jury thereon, tending to diminish the damages recoverable; for the inquiry is confined to the damages done by the fire. *Morton v. Water Co.*, 468.

EVIDENCE—*Continued.*

8. *Evidence—Pleadings—Declaration in Interest—Collateral Matters.*—In this action involving the amount in dispute by the parties, it is held that the introduction by the plaintiff of his amended complaint was not erroneous as a declaration by him in his own favor, as the court did not permit it as evidence of the amount due, and it did not prejudicially affect the question submitted. *Wilkins v. McPhail*, 559.

9. *Evidence—Witnesses—Impeachment—Warning.*—Where a witness testifies to matter it is proposed to impeach, by matter tending to show something collateral to the issue involved in the action, he should first be given proper warning before offering the impeaching testimony as to his bias, temper, or disposition towards the parties or the cause, by directing his attention to the impeaching evidence, so that he may have an opportunity to admit, deny or explain it. *In re Craven*, 562.

10. *Evidence — Vendor and Purchaser — Verified Account — Prima Facie Case.*—An itemized account purporting to be for goods sold and delivered to the defendant introduced in evidence, in an action to recover the purchase price, and duly sworn to, is competent, and raises a *prima facie* case as to the amount thereby appearing to be due. Revisal, sec. 1625. *Carr v. Alexander*, 665.

11. *Vendor and Purchaser—Evidence—Prima Facie Case—Principal and Agent—Accounting—Burden of Proof.*—Where a *prima facie* case has been made out by the plaintiff, in his action to recover the purchase price of goods sold and delivered to the defendant, and the latter contends that he, as the agent for the former, was to sell upon commission, and that he had accounted for such sales, except a small balance which he tendered, or offered to submit to judgment for that amount, the burden is upon the defendant to show the fact of agency, and of accounting thereon, which is for the determination of the jury upon the question of indebtedness. *Ibid.*

12. *Evidence—X-Ray Photographs—Accuracy.*—X-Ray photographs taken of a personal injury alleged to have been negligently inflicted by the defendant, in an action to recover damages therefor, may, with proper safeguards as to their accuracy, be used by the witness who has made them in explaining his evidence and be shown by him to the jury for their consideration and enlightenment. *Lupton v. Express Co.*, 671.

13. *Same—Expert Testimony—Exhibits to Jury.*—Where an X-Ray picture of a personal injury, pertinent to the inquiry in an action to recover damages, has been made by a medical expert, who testifies to some experience in making such pictures, and it is a reasonable inference from his evidence that it was an accurate and true representation, and his whole evidence shows that he believes it to be so, it is sufficient evidence of the accuracy of the photograph for the expert to explain his testimony therewith and exhibit them to the jury. *Ibid.*

EXCEPTIONS. See Appeal and Error, 19, 20, 43; Landlord and Tenant, 2.

EXCUSABLE NEGLECT. See Appeal and Error, 13; Judgments, 5.

EXECUTIONS. See Judgments, 9.

EXECUTORS AND ADMINISTRATORS. See Judgments, 11; Deeds, 24; Corporations, 6.

EXPERTS. See Appeal and Error, 5; Evidence, 3.

FEDERAL EMPLOYERS' LIABILITY ACT. See Commerce, 6; Master and Servant, 15, 16, 17, 21.

FEDERAL STATUTES. See Intoxicating Liquors, 1, 3, 4, 5, 7.

FELLOW-SERVANT. See Master and Servant, 22.

FINAL JUDGMENTS. See Railroads, 3.

FINDINGS. See Appeal and Error, 28, 30, 35, 54, 55; Judgments, 13, 14, 22; Mechanics' Liens, 2.

FIRE COMPANIES. See Damages, 1.

FIRE DAMAGES. See Evidence, 1.

FIRES. See Railroads, 1, 16, 17; Master and Servant, 15, 16, 17.

FISH AND OYSTERS.

1. *Fish and Oysters—Protection—Police Powers.*—Fish, including oysters, and other shellfish, etc., are a valued source of food supply, coming within the police power of the State, and are subject to the rules and regulations reasonably designed to protect them and to promote their increase and growth, and such rules and regulations may not be set aside and ignored because they indirectly affect or trench upon some private rights that are or would be ordinarily recognized. *State v. Sermons*, 285.
2. *Same—Statutes—License—Dealers—Private Beds.*—Revisal, sec. 2411, providing for issuing a license to persons engaged in the purchasing, etc., of oysters, directing that the license shall not be issued prior to 15 November, and shall expire on the 15th of the following March; and Revisal, sec. 2395, making it a misdemeanor for any one to engage in said business without having obtained the license required, make the rights of private owners of oyster beds subservient to their provisions, they being a reasonable police regulation to promote the increase and growth of oysters, etc.; but where the dealer is one who buys oysters from the private owner of oyster beds, and conducts his business without the license required, the rights of the owner of the beds are not involved, but the right of the dealer to transact his business in violation of a positive statute. *Ibid.*
3. *Same.*—Revisal, sec. 2383, as amended by chapter 967, Laws 1907, and chapter 85, Laws 1913 (Gregory's Supplement), cannot be construed together with the effect that the license is not required when oysters are shown to have been procured from private owners, there being no necessary or essential connection between the two, the first applying to all citizens of the State, and forbidding them to buy or sell oysters taken from public grounds or natural beds during a closed season, etc., and the other being a law referring only to regular dealers, requiring that they shall be licensed, and designed to render more effective the legislation in protection of the fish and oyster industries of the State. *Ibid.*
4. *Fish and Oysters—Statutes—License — Closed Season — Mandamus.*—Where a dealer in oysters applies for a license at the time when the statute forbids its issuance (Revisal, sec. 2411), and is refused, it affords no defense for his continuing to do business as such; and should the license have been wrongfully refused, his recourse is to apply to the courts for mandamus to compel its issuance. *Ibid.*

FIXTURES. See Deeds, 32.

FORFEITURES. See Equity, 2.

FORNICATION. See Adultery, 1, 2, 3.

FRAUD. See Equity, 1; Bills and Notes, 12; Cancellation, 1; Courts, 4; Principal and Surety, 1.

FRAUDULENT CONVEYANCES.

1. *Fraudulent Conveyances—Debtor and Creditor—Deeds and Conveyances—Evidence—Fraud—Husband and Wife.*—The mere declarations of the husband are not admissible as evidence against the wife in an action to set aside a deed made by the former to the latter as fraudulent as to his creditors; and the exclusion of such declarations becomes immaterial when it has been established that there was no fraudulent intent on his part. *Shuford v. Cook*, 52.

2. *Same—Intent—Scope of Inquiry.*—Upon cross-examination of the plaintiff in his action to set aside a deed made by a husband to his wife, upon the ground of fraud, much latitude is given upon the question of the defendant's fraudulent intent in making the conveyance, which affects the credibility of the witness or tends to assist the jurors; and the scope of the inquiry is broadened to take in all the relevant circumstances and conditions surrounding the parties. *Ibid.*

3. *Debtor and Creditors—Deeds and Conveyances—Husband and Wife—Fraudulent Intent—Evidence.*—In an action to set aside a deed from a husband to his wife as fraudulent against his creditors, it is competent for the former to testify why he had made the deed, when relevant to the question of his fraudulent intent. *Ibid.*

4. *Same—Principal and Surety—Insolvent Surety—Good Faith.*—When one of two sureties on a note has become insolvent and the other surety has paid off the note and brings action against the principal to set aside, as fraudulent against him, a deed he has made to his wife, it is competent for the defendant to testify that before he had made the deed he was informed by the cashier of the local bank that the insolvent surety had property, as affecting the question of his good faith and intent in retaining a sufficient amount of property to meet his obligations. *Ibid.*

5. *Debtor and Creditor—Deeds and Conveyances—Voluntary Conveyance — Presumptions — Fraudulent Intent — Evidence — Interpretation of Statutes.*—In an action to set aside a husband's deed to his wife for fraud as to his creditors, the presumption formerly arising from a voluntary conveyance is removed and the indebtedness of the husband is evidence only from which the intent may be inferred, and a requested instruction is properly refused which requires the defendant to satisfy the jury by the greater weight of the evidence that he retained property fully sufficient and available. Revisal, sec. 962. *Ibid.*

GRANTS. See Trespass, 2; Deeds, 8; Navigable Waters, 3; Public Lands, 1, 5, 6, 7, 12, 13, 14.

GUARANTORS. See Contracts, 8; Bills and Notes, 8.

HARMLESS ERROR. See Appeal and Error, 3, 5, 7, 9, 10, 14, 20, 23, 44; Principal and Agent, 3; Trials, 3, 10; Vendor and Purchaser, 2.

HEADLIGHTS. See Railroads, 12, 14.

HEALTH.

Health—County Commissioners—County Superintendent—Fixing Salary —Mandamus — Constitutional Law — Statutes.—Section 9, chapter 62, Public Laws of 1911, providing for a county board of health, by express provision requires the approval of expenditures made by them by the county commissioners, the latter, by constitutional provision, being given, among other things, general supervision of the levying of taxes and the finances of the county; and where the county commissioners have disapproved of the amount of salary the county board of health has agreed to pay the county superintendent of health and fixed a less sum therefor, a mandamus will not lie to compel the payment of a greater sum than that so determined upon. *Halford v. Senter*, 546.

HIGHWAYS.

1. *Roads and Highways—County Commissioners—Discretionary Powers—Constitutional Law.*—The county commissioners are charged with the duty of establishing roads in the county and maintaining them, and are authorized to pay therefor out of the county treasury; and when this is done by them in the exercise of their discretion, without fraud or malversation, the courts may not interfere. *Supervisors v. Comrs.*, 548.
2. *Same—Evidence—Dedication—Pleadings.*—Where township supervisors of roads seek to enjoin the county commissioners from work on a road on the ground that the road was not a public road, and it is alleged in the answer of the county commissioners that the road is a public road, which is confirmed by the owner of the land over which it runs, the effect is that of a dedication and acceptance, and the injunctive relief sought should be denied. *Ibid.*
3. *Roads and Highways—County Commissioners—Discretionary Powers —Township Supervisors—Constitutional Law—Statutes.*—Where by special legislative enactment the commissioners of a county are authorized to levy a special road tax upon the property of each township annually, and apply funds so collected from each township exclusively to road improvements therein, the discretionary power vested in the commissioners, under the Constitution, as to working any particular road, or which roads in the township shall be worked, etc., is not interfered with; and the powers of the township supervisors of roads, created by special statute, are, in this respect, subject to that of the county commissioners. *Ibid.*
4. *Roads and Highways—Commissioners—Ministerial Duties—Negligence —Individaul Liability—Pleadings—Demurrer.*—Public officers are held to an individual liability in the negligent performance of or negligent omission to perform a purely ministerial duty, to a person specially injured thereby, when the means to do so are available and when it does not involve the exercise of a discretionary or judicial power conferred upon them by statute; and the demurrer to the complaint, in an action against the individual members of a highway commission, alleging injury to the plaintiff solely by a defective approach to a bridge over a stream on a public highway in their charge, with ample previous notice of the defect causing the injury, that it was under the official control of the defendants, and that they had available means for repairing the defect alleged, is bad, it not being required that the plaintiff allege or show the act complained of was done "corruptly or with malice." *Hipp v. Farrell*, 552.

HIGHWAYS—*Continued.*

5. *Same—County Bridges—Judicial Notice.*—In this action to recover damages of the individual members of a highway commission, alleged to be caused by its negligent failure to keep the approach to a stream in proper repair, as to whether the court will take judicial notice that the bridge is a county bridge, and under the care and control of the county commissioners, Revisal, sections 2696 and 29, *quœre.* But the allegations of the complaint being sufficient that the bridge was under the sole care and control of the defendants, the question is not decided, and the demurrer is held to be bad. *Ibid.*

HOLDER IN DUE COURSE. See Bills and Notes, 1.

HOMICIDE. See Appeal and Error, 25, 29.

1. *Homicide—Provocation—Deadly Weapons—Evidence—Manslaughter.*—On a trial for homicide, evidence which tends to show that the deceased had first attacked the prisoner with a deadly weapon, a knife, resulting in his being killed by him, is sufficient for the consideration of the jury upon the question whether he fought in the heat of blood upon legal provocation, so as to reduce the degree of the homicide from murder to manslaughter, under the circumstances. *State v. Kennedy*, 288.

2. *Homicide—Sudden Assault—Malice—Rebuttal—Trials—Questions for Jury.*—Where the prisoner has been suddenly assaulted by the deceased with a deadly weapon, and the evidence in his behalf tends to show that the former thereupon took the latter's life, it is sufficient upon the question of whether the assault was calculated to so arouse his passion as to rebut the malice which would otherwise have made the killing a murder, and reduce the degree of the offense to manslaughter. *Ibid.*

3. *Same—Continued Assault—Appeal and Error.*—One who is acting in self-defense in an assault made upon him with a deadly weapon, a knife in this case, may continue the assault on his part, if reasonably necessary to put himself beyond danger and to the extent that the circumstances, as they reasonably appear, will justify him for that purpose; and where there is evidence tending to show that the party thus first assailed, seeing there was no way to further retreat, killed his assailant with a paling he had torn from a fence, by repeatedly striking him with it, after he had several times been cut, it is sufficient upon the question of manslaughter; and under such circumstances it is reversible error for the trial judge to withdraw that phase of the case from the jury, though this evidence conflicts with the testimony of the State's witnesses. *Ibid.*

4. *Homicide—Murder—Self-defense—Quitting the Combat.*—In order to establish a perfect self-defense for a homicide in a fight wrongfully brought about by the defendant, especially when he has done so by a battery, it must be shown by him that, at a time prior to the act of killing, he had "quitted the combat"; and while this expression does not necessarily imply a physical withdrawal at the peril of life and limb, he must show an abandonment in good faith and that he had so signified to his adversary. *State v. Kennedy*, 326.

5. *Same—Prior to Killing—Time of Killing—Trials—Instructions.*—One who has brought about a fight resulting in the death of his adversary cannot maintain a perfect self-defense by showing that at the pre-

HOMICIDE—*Continued.*

cise time the act was committed he was sorely pressed and could not abandon the combat with proper regard for his own safety; and where the evidence on behalf of the State tends to show that the defendant walked into the store of the deceased, quarreled with him, slapped him in the face while holding a pistol in his hand, and then shot and killed him with it, and on behalf of the defendant, that he had been first assaulted by the deceased and his brother, who knocked him against a partition in the barber shop, then to his knees, continuing to beat him on the head and shoulders, when he said, "Boys, get off of me" three or four times, then threatened to shoot, and as they did not do so, he fired the fatal shot: *Held*, upon this conflicting evidence, the charge of the court was correct, which, in substance, instruced the jury that if the defendant provoked the assault and fought willingly and wrongfully he would at least be guilty of manslaughter, unless, before delivering the fatal shot, he had in good faith abandoned the difficulty, and retreated as far as he could with safety. *Ibid.*

6. *Homicide—Circumstantial Evidence—Motive—Robbery—Identification of Money.*—Where circumstantial evidence is relied on by the State for conviction of a homicide, tending to show robbery of money as a motive for the crime, it is not required that the State prove that the identical amount or the identical money afterwards found on the prisoner was taken by him from the deceased, for evidence to establish motive for murder is not of the character required upon a charge of robbery alone. *S. v. Trull*, 363.

7. *Homicide—Circumstantial Evidence—Chain of Evidence—Instructions.* Where there are several phases of circumstantial evidence on the trial for a homicide not so related or interwoven that the jury may not find their verdict on one or several or all of them, it is not error for the judge to refuse to give a requested instruction that each circumstance testified to depended upon the truth of the preceding one, and "the chain is no stronger than its weakest link, and when broken becomes a rope of sand." *Ibid.*

8. *Homicide—Circumstantial Evidence—Degree of Proof—Instructions.*—Upon a trial for homicide wherein the State relies upon circumstantial evidence, it is not error for the trial judge to disregard the language of a special prayer for instruction offered by the defendant "that the circumstances so relied on must be so clear and convincing as to point unerringly to the guilt of the defendant, and must exclude every possibility of his innocence," where, using his own language, the judge has substantially complied therewith. *Ibid.*

9. *Homicide—Mental Incapacity of Defendant—Drugs—Appeal and Error—Findings.*—The refusal of a new trial by the judge on the ground that the defendant, charged with homicide, was under the influence of an opiate at the trial, and unable, for mental incapacity, to properly conduct his defense, is not held erroneous on this appeal, it appearing that as soon as the judge observed that the defendant did not seem to be right he adjourned court, had the defendant examined by the county physician, who reported the defendant in good condition the next morning, when the trial was proceeded with; and if any mental incapacity had theretofore existed, it had not been called to the attention of the court, and that the defendant throughout the trial was in full possession of his faculties. *Ibid.*

HUSBAND AND WIFE. See Principal and Surety, 1; Taxation, 6.

1. *Deeds and Conveyances—Husband and Wife—Deed of Wife—Contracts—Special Probate—Interpretation of Statutes—Constitutional Law.*—Revisal, section 2107, requiring that contracts made between husband and wife for a longer period than three years, and which affect or change any part of the real estate of the wife, shall be in writing, duly proved as required for conveyance of land, that the examination of the wife, separate and apart from her husband, etc., shall be taken, with the further certificate of the probate officer that it appears to his satisfaction that the wife freely executed such contract and freely consented thereto at the time of her separate examination, and that the conveyance is not unreasonable or injurious to her, is constitutional and valid, including within its terms and meaning a conveyance of lands by the wife to the husband; and therefore such conveyance without compliance with the statutory requirement that the probate officer certify that it "is not unreasonable or injurious to her" is void. *Butler v. Butler*, 584.

2. *Same—Amended Certificate.*—Where it appears that the probate officer of a conveyance of land made by the wife to the husband has omitted to certify that the conveyance was not unreasonable or injurious to her, and after the death of the wife seeks to correct the certificate by a further certificate stating that "it does appear to my satisfaction that the said conveyance is not unreasonable or injurious to her," the latter certificate speaks as of the time it was made, and it is *Held*, the second certificate was not an attempt to amend the first one by a statement of fact then existing, but a new and original certificate, which could not give vitality to the deed of the wife. *Ibid.*

3. *Deeds and Conveyances—Essentials—Delivery—Husband and Wife—Special Certificate—Interpretation of Statutes.*—A deed passes no title to land unless delivered in the grantor's lifetime, and it must be complete at the time of delivery; and where a deed to lands from the wife to her husband has not been properly probated before her death under the provisions of Revisal, section 2107, the probate may not thereafter be amended so as to make the conveyance a valid one which otherwise is void. *Ibid.*

4. *Deeds and Conveyances—Husband and Wife—Special Probate—Interpretation of Statutes.*—Chapter 109, Public Laws 1911, known as the Martin Act, by express terms is made subject to the provisions of section 2107 of the Revisal, and the construction of that section, that it includes within its terms conveyances of land by the wife to the husband, making the special certificate of the probate officer necessary to the validity of such deed, is not affected by the act of 1911. *Ibid.*

IDENTIFICATION. See Trials, 13.

IMPEACHMENT. See Evidence, 9; Trials, 1; Witnesses, 1.

IMPROPER ARGUMENTS. See Trials, 3.

INDIANS. See Issues, 1; Schools, 6.

INDICTMENT. See Affray, 1, 2; Libel and Slander, 2; Sheriffs, 1; Intoxicating Liquors, 9.

1. *Criminal Law—Indictment—Proof—Variance—Constitutional Law.*—The evidence must, at least in substance, correspond with the charge

INDICTMENT—*Continued.*

of an indictment for a criminal offense, and sustain it in order to convict the defendant, as he has the constitutional right to be informed of the accusation against him. Const., Art. I, secs. 11, 12 and 13. *State v. Gibson*, 318.

2. *Same—Note—Money—Nonsuit—Interpretation of Statutes.*—The indictment for false pretense must describe the thing alleged to have been thereby obtained with reasonable certainty, and by the name or term usually employed to describe it; and where the indictment charges obtaining money by a false pretense, and the State's evidence tends only to show that the defendant had obtained the signature of the prosecutor as an indorser or surety to a negotiable instrument under the assertion that others, whose financial responsibility was known to him, had promised to sign, as cosureties, and should sign before negotiation, which was in all respects false; that the defendant obtained money thereon from the bank with his signature alone, which he had been forced to take up with his own note, there is a fatal variance between the charge and the proof, and defendant's motion to nonsuit should be sustained. Laws 1913, ch. 73. *Ibid.*

3. *Same—Motions—Arrest of Judgment—Amendments.*—The State must prove the charge of a criminal offense as laid in the bill, without power to amend against the will of the defendant; and where the charge is made of obtaining money under a false pretense, and the evidence tends only to show that a note has been obtained, a motion to nonsuit is the proper method of raising the question of variance (Laws 1913, ch. 73), and a motion in arrest of judgment should be denied. *Ibid.*

4. *Criminal Law—Indictments—Variance—New Indictment.*—Where an indictment for a false pretense in obtaining money has failed on account of a variance in the proof tending to show that a signature to a note had been thus obtained, it is open to the State, upon another and proper indictment, to convict for the offense of obtaining the signature by false pretense, under Revisal, sec. 3433; and should the solicitor send another bill with averments agreeing with the proof, the trial court may hold the defendant to answer this indictment. *Ibid.*

INDORSERS. See Bills and Notes, 6, 7.

INFANTS. See Master and Servant, 13.

INJUNCTION. See Drainage Districts, 4; Appeal and Error, 35.

1. *Injunction—Public Benefits—Equity.*—The construction of public utilities, or works for public benefit, will not be restrained at the suit of private individuals, unless the damages caused thereby are both serious in amount and irreparable in character; and where a contractor for paving streets of a city with a combination of asphalt and concrete has located his mixing and heating apparatus near the boarding-house of the plaintiff, and it is found by the trial judge that the location was a proper one for the character of the work, which was for the public benefit, and that the defendant was able to respond in damages for the injuries caused, an order restraining his work to the final hearing will be denied. *Jones v. Lassiter*, 750.

2. *Same—Main Relief—Prima Facie Case—Trial by Jury.*—Where relief by injunction is the principal remedy sought in a suit, the courts

INJUNCTION—*Continued.*

will generally continue it to the hearing upon plaintiff's making out a *prima facie* case; but this rule has no application where important public works and improvements are sought to be stopped, for in such instances the courts will ordinarily let the facts be found by the jury before interfering by injunction. *Ibid.*

INNOCENT PURCHASERS. See Deeds, 18, 21.

INSOLVENT CORPORATIONS. See Corporations.

INSPECTION. See Master and Servant, 26.

INSTRUCTIONS. See Homicide, 7, 8; Larceny, 1; Evidence, 6; Master and Servant, 21; Appeal and Error, 1, 3, 10, 14, 20, 27, 40, 41, 42, 50, 53; Carriers of Passengers, 5; Telegraphs, 9; Trials, 2, 5, 6, 7, 9, 10, 15, 18; Cancellation, 1; Contracts, 1; Evidence, 5; Homicide, 5; Wills, 7; Equity, 3.

INSURANCE. See Insurance, Life; Damages, 1.

1. *Insurance—Policies—Contracts—Interpretation.*—A contract or policy of insurance, like any other contract, is construed to carry out the intention of the parties as gathered from the words employed, and strictly against the insurer when ambiguously or obscurely expressed, as presumably it has been prepared by it; and the object of the contract being to afford an indemnity against loss, it will be so construed as to effectuate this purpose rather than defeat it. *Crowell v. Insurance Co.*, 35.

2. *Same—Automobile—Reasonable Provisions—Hire or Passenger Service.*—In construing a policy upon an automobile, with express provision that it "will not be rented or used for passenger service of any kind for hire except by special consent of the company indorsed on the policy," it is held that a single act of renting or using the car for hire, by an employee of the owner without his knowledge, will not in itself be considered as such a breach of the owner's warranty as will forfeit the insurance thereon. *Ibid.*

3. *Same—Loss by Fire—Continuous Service.*—Where the owner of a garage having automobiles for hire also keeps one there, with the others, but as his private car and for his own personal use, and has the same insured under a policy containing the provision that he will not rent out or use the car for passenger service for hire, the facts that his employee, without his knowledge, had taken a party out for hire in the machine to a certain place, and, on the next day, after the passengers had been discharged, and after the owner had himself resumed possession and control of the car, it was destroyed by fire, and that some time before, and on another occasion, this car had been used by an employee once in taking a passenger to the railroad station, do not constitute a forfeiture of the insurance, the renting or using the car for hire, as expressed in the policy, contemplating something of a more continuous nature than the isolated instances mentioned. *Ibid.*

4. *Same—Hazard or Risk.*—The plaintiff having lost his automobile by fire, which was insured under a policy providing it should not be rented out or used in passenger service for hire, sued to recover thereon, and it appeared that immediately before the loss his employee, without his knowledge, had used the car for hire to others,

INSURANCE—*Continued.*

but that the loss had occurred thereafter, and while being returned, after having some repairs made, to the owner's garage under his directions. There being no evidence that the outward trip had any direct bearing upon the loss, or increased the risk at the time thereof, it is *Held*, that, under the circumstances, the loss did not fall within the intent and meaning of the prohibitive clause of the policy, so as to work a forfeiture thereunder. *Ibid.*

5. *Insurance—Principal and Agent—General Agent—Waiver—Implied Authority.*—A general agent of an insurance company impliedly has authority to waive a stipulation in a policy of insurance, in this case, on a horse, and his receipt of the premium on the policy with knowledge that the local agent had waived the stipulation would be a waiver by the general agent, and binding on the insurer. *Godfrey v. Insurance Co.*, 238.

INSURANCE, LIFE.

1. *Insurance, Life—Application—Medical Certificate.*—Where recovery upon a policy of life insurance is resisted upon the alleged grounds that the insured has made false statements in his application, as to his having palpitation of the heart and other organic troubles, the plaintiff may introduce in evidence the medical certificate of the company's regular medical examiner, attached to the policy, tending to corroborate the contention of the plaintiff that the deceased was in good health at the time of the issuance of the policy, and in contradiction of the defendant's evidence on the question. *Barrow v. Insurance Co.*, 572.
2. *Same—Evidence—Medical Expert.*—Where an insurance company resists payment of matured life insurance under its policy, and the certificate of the company's medical examiner, attached to the policy, has been introduced in evidence, it is competent to ask a medical expert witness whether, upon the matters stated in the certificate, the insured could have had heart trouble at the time, when the question is material to the controversy. *Ibid.*
3. *Insurance, Life—Application—Statements—Physicians—Consultations—Evidence—Trials—Instructions.*—In this case it is contended by a life insurance company, as a defense to the payment of its matured policy, that the insured had untruly stated in his application that he had not previously consulted other physicians than those he has named, and there is evidence that he had conversations with other physicians about his physical condition. The charge is approved as to whether these conversations were merely incidental or amounted to a consultation. *Ibid.*

INSURER. See Bailment, 1.

INTENT. See Statutes, 10, 11.

INTERPRETATION. See Statutes; Corporations, 2; Navigable Waters, 1; Schools, 1; Deeds, 42, 43; Wills, 13.

INTERSTATE COMMERCE. See Commerce; Intoxicating Liquors, 6.

INTERURBAN RAILWAYS. See Statutes, 4.

INTIMATION OF OPINION. See Appeal and Error, 1, 2.

INTOXICATING LIQUORS.

1. *Intoxicating Liquors—Federal Statutes—Constitutional Law.*—Chapter 90, Federal Statute Anno. Supp. 1914, p. 208, known as the Webb-Kenyon law, is not in contravention of the Constitution of the United States, and is a valid congressional enactment. *State v. R. R.*, 295.

2. *Intoxicating Liquors—Commerce—Constitutional Law—Persons Interested.*—The act of Congress known as the Webb-Kenyon law classifies interstate shipments into legal and illegal, and withdraws all shipments into prohibition territory from other States from the effect and operation of the commerce clause of the Federal Constitution which are made with the intent to violate the prohibition laws, the illegal intent of any person interested therein, made determinative by the law, being that of the consignee or other person interested in the "article" transported. *Ibid.*

3. *Intoxicating Liquors—Federal Statutes—Police Powers—State Lines—State Regulations.*—The act of Congress known as the Webb-Kenyon law is interpreted with regard to its language and the facts and circumstances attendant on its passage which throw light on its meaning and purpose, including also the significance and history of precedent legislation, and, thus construed, it is *Held*, that such shipments made illegal by this statute are brought within the police power of the State when and as soon as they cross the State line, and are subject to such rules and regulations as are reasonably designed to make such power effective. *Ibid.*

4. *Intoxicating Liquors—Federal Statutes—Police Powers—Incidental Powers.*—The Webb-Kenyon law having conferred upon the States the power to regulate, under their police powers, the sale of intoxicating liquors within their prohibition territory, so far as the Federal commerce is concerned, the grant of this power carries with it the authority to do all things necessary to accomplish the expressed purpose of the grant. *Ibid.*

5. *Intoxicating Liquors—Federal Statutes—State Statutes—Carriers of Goods—Books for Inspection—Criminal Laws.*—Chapter 44, Public Laws 1913, known as the "search and seizure law," entitled "An act to secure the enforcement of the laws against the sale and manufacture of intoxicating liquor," making unlawful, by section 1, the sale, exchange, or bartering, etc., of such liquors, and, by section 2, keeping them in possession for the purpose of sale; and making the possession thereof in certain quantities, varying with the kinds, *prima facie* evidence of the violation of its second section, after establishing certain methods of procedure for the enforcement of these sections, required railroads and other common carriers "to keep a separate book in which shall be entered immediately upon receipt thereof the name of the person to whom the liquor is shipped, the amount and kind received," etc., which shall be open for inspection to any officer or citizen of the State, during business hours, etc., and enacting that "said book shall constitute *prima facie* evidence of the facts therein," etc., is held to be enforcible under the provisions of the Webb-Kenyon law, and the refusal by the agent of the carrier to a citizen of this State an inspection in the matter authorized by the statute makes him guilty of a misdemeanor, as therein declared. *Ibid.*

6. *Same—Commerce—Regulations—Interstate Commerce Commission—Judicial Notice—Burden on Commerce.*—The State court will take

INTOXICATING LIQUORS—*Continued.*

judicial notice of the regulations by the Interstate Commerce Commission of common carriers, regarding the commerce clause of the Federal Constitution, made in pursuance of an act of Congress; and it is held that chapter 44, Public Laws 1913, requiring the carriers to keep a record of intoxicating liquors, names of consignees, etc., in this State, cannot be construed as a burden upon interstate commerce, the book being only an excerpt from the books which the carrier is required by the Interstate Commerce Commission to keep, but is only a reasonable police regulation, necessary to the effective regulation and control of a subject submitted to the State by the Federal law. *Ibid.*

7. *Intoxicating Liquors—Carriers of Goods—Federal Statutes—Commerce—Disclosures Forbidden—Legal Process.*—The Federal statute forbidding disclosures by the carrier as to interstate shipments without consent of the shipper, which may be used by competitors to the shipper's disadvantage, by express terms excludes such information given in response to any legal process authorized by any State or Federal court, or to any officer or other duly authorized person seeking such information for "persons charged with or suspected of crime," etc., and our statute, chapter 44, Public Laws 1913, requiring that the railroads, during business hours, permit any citizen of the State to inspect the company's book, showing the receipt, etc., of intoxicating liquors, comes directly within the intent and meaning of the Federal law. *Ibid.*

8. *Intoxicating Liquors—Federal Criminal Code—Commerce—Conflicting Laws—Later Enactments.*—Chapter 44, Public Laws 1913, requiring that the name of the recipient of intoxicating liquors be signed on the books, etc., which is an addition to the requirements of the Federal Criminal Code, secs. 238 and 239, is not in conflict therewith, and if it were otherwise, the Webb-Kenyon law, being later enacted and giving the State authority to enact a valid statute on the subject, is controlling. *Ibid.*

9. *Intoxicating Liquors—Indictment—Exceptions to Statute—Defenses.*—An indictment for the sale of intoxicating liquor need not charge that the defendant was not a druggist, etc., duly licensed, for this is a matter of defense. *S. v. Wainscott*, 379.

ISSUES. See Appeal and Error, 10, 15; Commerce, 8; Contracts, 18; Deeds, 37; Pleadings, 12; Trials, 17.

Issues—Pleadings—Evidence — Schools — Indians — Immaterial Matters.—Issues are sufficient if they are determinative of the controversy and enable the parties to present every phase of the evidence relevant to the question involved, and the issue in this action to compel the admission of children into the school established for the Croatan or Cherokee Indians of Robeson County, as raised by the pleadings, being only as to whether the children were of Indian blood, it becomes immaterial whether the applicants had complied with the provisions of Revisal, section 4241. *Goins v. Indian Training School*, 736.

JUDGMENTS. See Deeds, 24; Appeal and Error, 13, 18, 19, 22, 26, 37, 54, 55; Pleadings, 10; Trusts, 1, 13, 15; Corporations, 1; Courts, 4, 10.

1. *Judgments — Estoppel — Disseizin — Acquiescence — Limitation of Actions.*—Where a judgment is rendered in favor of a party to an action

JUDGMENTS—*Continued.*

to recover lands it will operate as an estoppel against all claiming under him from the same source; but where such claimant has thereafter entered upon, inclosed, and used the land for the best or only purpose for which it was capable, for the statutory period of twenty years, he will acquire a new estate therein by disseizin and acquiescence. Revisal, sec. 383. *Moore v. Curtis*, 74.

2. *Receivers—Equity—Decrees—Collateral Attack—Judgments—Courts.*—Where in the exercise of its equitable jurisdiction the court has entered judgment appointing a receiver for the administration of a trust fund its judgment is not open to collateral attack. *Rousseau v. Call*, 173.

3. *Judgments—Vendor and Vendee—Goods Sold and Delivered—Pleadings—Allegations—Implied Promise to Pay—Default Final.*—Upon allegations of a complaint of goods sold and delivered to the defendant in accordance with an attached itemized statement showing dates, kind, quantity, and price, alleging the prices were known to defendant at the time of purchase, a judgment final in the amount stated may be entered for the want of an answer, there being an implied promise to pay the stated price; and an inquiry not being required. *Hyatt v. Clark*, 178.

4. *Judgments—Pleadings—Default Final.*—Upon failure to answer a complaint within the appointed time, alleging the indebtedness of defendant to plaintiff for goods sold and delivered from time to time within a specified period, according to an attached itemized statement, for which the defendant contracted and agreed to pay at the prices charged, and that a certain sum was due thereon after deducting all proper credits, a judgment by default final will not be set aside. *Miller v. Smith*, 210.

5. *Judgments—Default Final—Excusable Neglect—Meritorious Defense.*—Excusable neglect and a meritorious defense must be shown in order to set aside a judgment by default final properly rendered for the want of an answer. *Ibid.*

6. *Judgments—Title to Lands—Estoppel.*—Where in an action for the recovery of land both parties claim from the same person, H., a judgment rendered in favor of plaintiff against H., involving the title to the *locus in quo*, established at least a *prima facie* title in plaintiff's favor, and will estop the defendant from asserting his title as purchaser acquired at a foreclosure sale under a mortgage subsequently executed. *Buchanan v. Hedden*, 222.

7. *Judgments—Title to Lands—Deeds and Conveyances—Estoppel.*—A judgment in an action involving the title to land has the force and effect of a deed so as to become a connecting link in the chain of title of the successful party and those claiming under him, and estops the adverse party and his privies. *Ibid.*

8. *Judgments—Strangers—Estoppel—Divisional Line of Lands—Chain of Title—Evidence.*—A judgment roll is incompetent as evidence to estop in a separate action one who was not a party from claiming a different divisional line of lands than therein established, though held, in this case, as competent to be shown as a mere link in the plaintiff's chain of title. *Keenan v. Commissioners*, 246.

9. *Judgments—Liens—Limitation of Actions—Successive Executions.*—While issuing execution under a judgment rendered in the Superior

JUDGMENTS—*Continued.*

Court regularly within the intervals of three years prevents the judgment from becoming dormant, and the necessity of applying to the court for special leave to issue execution under Revisal, sec. 620, the lien of the judgment upon the lands of the judgment debtor expires in ten years from its rendition. *Barnes v. Fort*, 431.

10. *Same—Death of Judgment Debtor—Administration—Remedy—Procedure—Statistics.*—A judgment creditor who has kept his judgment alive by issuing successive executions thereunder may cause execution to issue without leave of court after the expiration of the ten years, but within three years from the issuance of the last execution, though the lien of the judgment has been lost under the statute, and levy on the land or personalty of the judgment debtor; but upon the death of the latter, this right ceases and he must proceed to collect his judgment in the regular course of administration of the decedent's estate as provided by the statute. *Ibid.*

11. *Judgments—Liens—Limitations of Actions—Executors and Administrators—Pleas.*—An administrator may plead the statute of limitations, after the death of the judgment debtor, to the issuance of an execution under a judgment kept alive by successive executions beyond the ten years period, and so may an heir at law, when it is sought to subject lands, which have descended to him, to the payment of debts. *Ibid.*

12. *Judgments—Scope of Action—Estoppel.*—Where a former decree has been entered in proceedings which were only designed and intended to convert certain lands devised into cash and to preserve the fund in lieu thereof, and which goes beyond its intended purpose and erroneously construes the terms of the will, and without all the necessary parties, it will not thereafter estop the beneficiaries, denied their rights under a proper interpretation of the devise, from asserting them in a proper and independent suit; and in this case it is further held, that mutuality, necessary to an estoppel, was lacking. *Hobgood v. Hobgood*, 485.

13. *Judgments—Motions to Vacate—Findings—Appeal and Error.*—The findings of fact of the trial judge, upon motion made to vacate a judgment, are conclusive on appeal when there is any evidence to support them. *Harrison v. Dill*, 542.

14. *Judgments by Consent—Motions to Vacate—Findings—Judgments Vacated.*—A consent judgment entered in an action rests upon agreement made between two of the parties, which is authorized by the court, and when upon motion to vacate the judgment made in the lower court it appears from the facts found by the judge that the movant had filed an answer in due form denying the material allegations of the complaint, and a judgment has been entered purporting to be a consent judgment, but in fact without the consent of the movant, or his attorney of record, and that he had a good and meritorious defense, the judgment will be vacated. *Ibid.*

15. *Same—Two Defendants—Consent of One.*—Where it appears that a judgment against two defendants, purporting to have been entered by consent, was not in fact consented to by one of them, and that it was proper to have set it aside as to him, it is not error for the trial judge to refuse to vacate the entire judgment as to both defendants, when it therein appears that the subject-matter is not the same and that the plaintiff withdrew his suit as to the other defendant. *Ibid.*

JUDGMENTS—*Continued.*

16. *Judgments—Estoppel.*—A judgment in an action by a landlord against his tenant and another to recover rent for the land, is not an estoppel in another action between the defendants, involving only the question of an account and settlement between them, exclusive of the question of rent. *Wilkins v. McPhail*, 558.

17. *Transference of Cause—Papers Omitted—Evidence—Identification.*—Where an order has been made by the court that an omission of claim and delivery papers in transferring a cause from another county be supplied, and thereafter a party to the cause introduces the papers upon the trial, evidence of the genuineness of the signature of the clerk of the Superior Court to whom the order was directed, indorsed thereon, and also that of the process officer who served the papers, is sufficient for identification. *Ibid.*

18. *Judgment—Attorney and Client—Consent of Attorneys—Scope of Action—Pleadings.*—Consent of the attorney alone to the entry of a judgment, given without the knowledge and consent of his client, which, in its scope, is outside of any matter set out in the pleadings, will not bind his client, a party to the action. *Hoell v. White*, 640.

19. *Same—Mortgages—Cancellation—Foreclosure.*—An action to cancel a note secured by mortgage, on the ground of payment, and asking injunctive relief against foreclosure, under the power of sale contained in the mortgage, wherein the answer does not ask foreclosure by the court or set up a counterclaim or cross action, does not embrace within its scope the entry of a consent judgment of foreclosure, but postponing the sale, and it is necessary to the validity of such judgment that the consent of the party be obtained, and the consent of his attorney thereto is insufficient. *Ibid.*

20. *Judgments—Nonsuit—Mortgages—Findings of Jury—Payment—Foreclosure.*—In this case it is held that a judgment of nonsuit granted by the court is only his finding that the evidence was insufficient to decree the cancellation of the mortgage, the subject of the action, and there being no finding by the jury upon the issue of payment, a decree of foreclosure was improperly entered against the plaintiff. *Ibid.*

21. *Judgments—Not Signed by Judge—Validity.*—The validity of a judgment entered in the course and practice of the courts is not affected by the fact that it is not signed by the presiding judge at the bottom. *Belcher v. Cobb*, 689.

22. *Judgments—Motions — Meritorious Defense — Findings — Prima Facie Case—Trials—Questions for Jury.*—Upon motion to set aside a judgment for excusable neglect, where matters are stated by affidavit and relied upon as constituting a meritorious defense, the judge of the Superior Court hearing the motion should make his findings of fact from the matters set forth and draw his conclusions of law therefrom as to whether a *prima facie* case has been established; and if the movant in good faith shows facts which raise an issue sufficient to defeat his adversary, if found in his favor, this issue should be determined by the jury. *Gaylord v. Berry*, 733.

23. *Judgments—Motions—Excusable Neglect—Evidence Sufficient.*—Upon motion to set aside a judgment for excusable neglect, a *prima facie* case is shown by defendant, the movant, when he has established the facts that he employed and paid an attorney regularly practicing in

JUDGMENTS—*Continued.*

the county wherein the action had been brought; that he put the attorney in possession of the facts relied upon as a defense; that the attorney promised to attend court and look out for the movant's interests, but failed to file an answer, and judgment by default was entered against him; that the movant acted with ordinary prudence and was not, himself, in default, and that his attorney is insolvent. *Ibid.*

JUDICIAL NOTICE. See Highways, 5.

JUDICIAL SALES.

1. *Judicial Sales—Mortgages—Equity of Redemption—Purchaser—Rights to Possession.*—The equity of redemption of a mortgagor of lands is subject to sale under execution under a judgment obtained against him, and the sheriff's deed made in pursuance thereof passes his interest to the purchaser and enables the latter to maintain his action to recover the lands from the mortgagor or his assignee. *Parrott v. Hardesty*, 667.
2. *Same—Limitation of Actions—Adverse Possession—Evidence.*—Where the purchaser of land sold under execution acquires the sheriff's conveyance of the equity of redemption, and the right to recover possession unless the same is barred by the adverse possession of one holding under a deed from the mortgagor and the note and mortgage assigned to him by the mortgagee, and it appears that the deed was executed within five years from the commencement of the action and that the assignment of the note and mortgage did not purport to operate upon the land, evidence of such adverse possession is held insufficient when the claimant, though testifying that he had lived on the land for about eight years, and farmed it five years before he came into possession of it, does not state the character of the possession he had held, and the time elapsing between the execution of his deed and the time the action commenced, being insufficient. *Ibid.*

JURISDICTION. See Commerce, 3; Attachment, 1; Appeal and Error, 33; Affray, 3; Courts, 1, 2, 3, 4; Appearance, 1.

JURORS. See Appeal and Error, 29.

JURY. See Appeal and Error, 34; Evidence, 13.

JUSTICES OF THE PEACE. See Courts, 15; Affray, 4.

LABORERS. See Liens, 1; Corporations, 2, 4.

LACHES. See Drainage Districts, 2, 5.

LANDLORD AND TENANT.

1. *Landlord and Tenant—Tenant's Possession—Action of Title.*—Where one has entered into possession of lands as tenant of another under an agreement of lease he may not maintain an action involving title, while in possession of the premises, against his lessor during the continuance of the lease, without first having surrendered the possession which he has acquired under the terms of his agreement. *Lawrence v. Eller*, 211.
2. *Same—Exceptions—Deeds and Conveyances—Estoppel.*—The restricted instances making exception to the general rule that a tenant may not

LANDLORD AND TENANT—*Continued.*

sue for title of the leased premises which he has acquired under his contract of lease apply to cases where, after the renting, the title to the landlord has terminated or has been transferred either to a third person or the tenant himself; and in courts administering principles of equity the estoppel is not recognized when the tenant has been misled into recognition of his lessor's title by mistake or fraud, and under circumstances which would induce a court of equity to hold the landlord a trustee for the tenant, or other exceptions of a restrictive nature which do not apply to the consideration of this case. *Ibid.*

3. *Landlord and Tenant—Tenant's Possession—Action of Title.*—If the principles of estoppel of a tenant in possession under and during the continuance of his lease do not apply to his action involving the issue of title alone, *semble* the exception to the general rule does extend to those instances where the possession and the rights growing out of or incident to it are presented or in any way affected. *Ibid.*

4. *Landlord and Tenant—Tenant's Possession—Action of Title—Cloud on Title — Gravamen of Action — Incidental Matters — Equity.*—In this action by the tenant in possession of lands under his lease against his landlord under claim of acquisition of a superior title it is *Held*, that the gravamen of the action is to have the plaintiff declared the true owner, and that the plaintiff's demand to have defendant's deed removed as a cloud upon his title is only an incident and evidential, and does not affect the matter. *Ibid.*

LARCENY.

Criminal Law — Larceny — Exchange of Currency Bills — Felonious Design—Trials—Instructions—Evidence.—Under an indictment for larceny, where there is evidence that the prosecuting witness went into the defendant's store, handed him, at his request, a $50 bill to look at, which he carried to the back of the store and gave the witness a bill which he put into his pocketbook without examination, and ten minutes thereafter he examined the bills in his pocketbook, found a $2 bill which he had not had before, and that his $50 bill was missing; that he immediately reëntered the store, asked for the defendant, but discovered he had gone: *Held*, an instruction was correct that the jury should find the defendant guilty, should they find from the evidence beyond a reasonable doubt that the defendant obtained possession of the $50 bill with an existing felonious intent permanently to deprive the prosecutor of his ownership of the money and to convert it to his own use. *State v. Lyerly*, 377.

LEGISLATIVE ACTS. See Constitutional Law, 9.

LEGISLATIVE DISCRETION. See Taxation, 9.

LEGISLATIVE POWERS. See Constitutional Law, 8.

LIABILITY. See Commerce, 2.

LIBEL AND SLANDER.

1. *Libel and Slander—Justification—Evidence—Punitive Damages—Burden of Proof—Good Faith—Express Malice.*—Where in an action for slander the defendant pleads justification, but fails to introduce evi-

LIBEL AND SLANDER—*Continued.*

dence of the truth of the libelous matter or that his plea was made in good faith, the issue of his good faith is not presented; for the burden of proof of such matters is upon the defendant; and in this case the charge of the court was correct that the plea of justification unproved or unsupported by the evidence could be considered by them upon the question of aggravation under the issue of punitive damages, having charged that such damages could not be awarded unless express malice should be found. *Ivie v. King*, 261.

2. *Libel and Slander—Indictment—Ambiguous Language—Questions for Jury.*—The rule of evidence ordinarily applying to the charge of slander of an innocent and virtuous woman (Revisal, 3640) that parol evidence to show a meaning contrary to that which the words clearly imply is inadmissible, can have no application when these words are ambiguous and admit of a slanderous interpretation, for then it becomes a question for the jury to determine whether they amounted to the slanderous charge in the reasonable apprehension of the hearers. *State v. Howard*, 312.

3. *Same—Evidence.*—On trial of an indictment for slandering an innocent and virtuous woman (Revisal, sec. 3640), testimony that the defendant had said he had quit his old girl (the woman); another named person was going with her now; that she was no lady, but a crook, etc., is sufficient to sustain a conviction of the offense charged. *Ibid.*

LICENSE. See Taxation, 7; Fish and Oysters, 2, 4.

LICENSEE. See Railroads, 10, 12.

LIENS. See Judgments, 9, 11; Deeds, 33; Corporations, 2, 3, 4; Receivers, 1; Logs and Logging, 1.

Liens—Insolvent Corporations — Contracts — Laborer—Interpretation of Statutes.—A contractor furnishing his own teams, labor, etc., in hauling materials for the building of a bridge by a corporation having since become insolvent within the two months next preceding the date of the institution of the proceedings in insolvency, is not engaged in doing labor or performing "service of whatever character" within the meaning of Revisal, sec. 1206, giving a laborer a "first and prior lien upon the assets of such corporation," the statute not applying to independent contractors, whose loss or profits are regulated under their contract. *Iron Co. v. Bridge Co.*, 512.

LIMITATION OF ACTIONS. See Deeds, 17; Easements, 3; Judgments, 1, 9, 11; Possession, 1, 2; Public Lands, 14, 15; Taxation, 1, 3, 4, 5; Trusts, 3, 4; Vendor and Purchaser, 6; Judicial Sales, 2; Carriers of Goods, 3.

1. *Limitation of Actions — Mortgages — Actions to Foreclose — Absence from State—Interpretation of Statutes.*—Revisal, sec. 366, is general in its terms and excludes from the computation of the statutory period which will bar a right of action the absence from the State for a year or more of the party pleading the statute of limitation, without exception of instances where proceedings *in rem* will lie against property situated here; and where the ten-year statute, Revisal, sec. 391, subsec. 3, relating to the foreclosure of a mortgage on land, is pleaded, the absence of the mortgagor from the State for the length of time prescribed in the first named section, or longer, will not be counted, nor will any presumption of payment of the debt be raised within the period allowed for the commencement of the action. *Love v. West*, 13.

LIMITATION OF ACTIONS—*Continued.*

2. *Limitation of Actions—Mortgagor's Possession—Equity—Accounting.* It being held in this case that the defendants are barred by the statute of limitations, and by their laches, in equity, from establishing a parol trust in the plaintiff's lands, it became unnecessary to decide the question whether, under the circumstances, the defendants really held an equity in the said lands, or were entitled to an accounting, or other relief. *Coxe v. Carson*, 132.

3. *Limitations of Actions—Contract Price—Payment—Reasonable Time—Questions for Jury—Trials.*—In an action to recover the balance of the purchase price of lands, with allegation and evidence that the defendant purchased the interest therein of the several plaintiffs at a certain price upon agreement that they should receive the same as the other owners of the land, who had subsequently been paid a greater price, the defendant pleaded the statute of limitations, three years and a day or two having elapsed since the transaction with an owner receiving a larger sum. There was evidence *per contra. Held*, the character of the transaction, if established, implied that the defendant should be given a reasonable time in which to pay the plaintiffs this difference in price, and this question of reasonable time was one to be determined by the jury, together with the question of whether the alleged agreement had been made. *Holden v. Royall*, 676.

LOGS AND LOGGING.

1. *Logs and Logging—Liens—Work Done—Severed Trees—Personalty—Interpretation of Statutes.*—One who enters into a contract to cut, haul and raft logs after the standing timber upon lands have been felled for the purpose, has, while logs are in his possession, a lien thereon for the services thus performed, under the provisions of Revisal, section 2017, the timber after its severance from the land being regarded as personalty. As to whether the lien rested also by common law, *quære. Thomas v. Merrill*, 623.

2. *Same — Vendor's Lien — Claim and Delivery — Accounting — Value of Property Seized.*—The plaintiff contracted to sell the standing timber on his lands to L., the latter to cut, haul and remove it, and pay therefor at a certain price per thousand feet. L. contracted with the defendant that the latter should receive a certain sum per thousand feet for cutting, hauling, rafting the logs after the latter had been felled. L. abandoned his contract with the plaintiff, who took possession of the logs that had been cut and hauled, by claim and delivery proceedings, from the defendant, the value of which exceeded the amounts due by L. to both the plaintiff and defendant; but the logs were lost or not available for a sale thereof. *Semble*, the plaintiff did not have a lien on the logs for the purchase price, and *Held*, that the plaintiff must account to the defendant for the value of the logs, and the lattter is entitled to recover the amount due him for cutting and hauling them. *Ibid.*

LOTTERIES.

1. *Statutes—Constitutional Law—Police Regulations—Lotteries.*—A "lottery" or game of chance is one injuriously affecting the morals of the people, and laws and regulations necessary for the protection of the health, morals, and safety of society are strictly within the legitimate exercise of the police power of the State, and being of a

LOTTERIES—*Continued.*

remedial nature, they will be so construed as to suppress the mischief and advance the remedy, and to defeat all evasions for the continuance of the mischief. *State v. Lipkin*, 265.

2. *Same—Definition of Lottery.*—The word "lottery" is not a term of the common law with a recognized and established legal definition, and the courts in construing a remedial statute affecting lotteries, or schemes for disposing of real and personal property by chance, will give a meaning to the term according to its use in a popular sense, and with reference to the mischief it is intended to redress. Hence, a lottery may be defined, for all practical purposes, any scheme for the distribution of prizes, by lot or chance, by which one on paying money or giving any other thing of value to another obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine. *Ibid.*

3. *Same—Advertising Scheme.*—A concern selling furniture at a certain fixed price, giving the purchaser a choice of a variety of articles therefor, upon payment of a small weekly sum until the amount is paid, with the agreement that the concern may, at its own discretion, and as an advertisement, at any time, give the furniture to the purchaser without his making further payment, and by no fixed rule, and providing that should he fail to continue his payments he shall forfeit all payments theretofore made by him, is engaging in running a lottery, by whatever name called, or by whatever artifice concealed, in violation of our statute, Revisal, sec. 3726. *Ibid.*

4. *Statutes — Lottery — Federal Constitution — Property Rights — Equal Protection.*—The enactment of a law for the suppression of lotteries lies within the police power of a State, and its enforcement does not wrongfully deprive a citizen of his private rights or of the equal protection of the law under the Constitution of the United States, Article XIV, sec. 1. *Ibid.*

MALICE. See Officers, 3; Homicide, 2; Libel and Slander, 1.

MANDAMUS. See Health, 1; Fish and Oysters, 4.

MANSLAUGHTER. See Homicide.

MARRIAGE. See Adultery, 3.

MARRIED WOMEN. See Trusts, 4.

MATURITY. See Bills and Notes, 8.

MASTER AND SERVANT.

1. *Electricity—Master and Servant—Duty of Master—Safe Place to Work—Trials—Evidence—Questions for Jury.*—It is the duty of the master to furnish his servant a reasonably safe place to do the work required of him in view of the dangerous nature of his employment, imposing a high degree of care when a dangerous instrumentality such as electricity is used; and where the employee receives a severe shock, resulting in serious injury to him, while in the discharge of his duties in the way usually adopted and sanctioned and approved by the employer, which shock was caused by the operation of an electric motor or its appliances used in operating the power plant at which he was working, and the employee was ignorant as to the operation of the machine and was not an electrician, his duty being

MASTER AND SERVANT—*Continued.*

to keep the belts and shafting in operation and in no wise relating to the operation of the motor itself, the facts are sufficient to take the case to the jury upon the issue of defendant's actionable negligence. *Cochran v. Mills Co.*, 57.

2. *Electricity—Master and Servant—Trials—Evidence—Res Ipsa Loquitur.*—Where there is evidence that the plaintiff, an employee of the defendant in the latter's mill operated by electricity, has received the injury complained of by catching hold of an iron pipe heavily charged with the current; that the plaintiff had neither knowledge of nor duty in connection with the electric motor or appliances, but that these were in the exclusive charge and control of the defendant; that the plaintiff was in the performance of his duties at the time in a manner known to and approved by the defendant, and which had been customary for years, without injurious result, and there being no evidence that the corporation furnishing the defendant with electricity had supplied a heavier voltage on the occasion than usual, the doctrine of *res ipsa loquitur* applies. *Ibid.*

3. *Electricity—Master and Servant—Duty of Master—Instruction and Warnings—Trials—Evidence—Nonsuit.*—An employee of a power plant driven by electricity whose duty it is to see that the mechinery is properly kept in operation, but is inexperienced and has no duty in connection with operating the motor itself, has a right to assume that his employer will not needlessly or negligently expose him to danger; and under the circumstances of this case it is held that the failure of the defendant to notify the plaintiff that a ground wire from the motor, used for protection and safety, had been removed, with evidence tending to show that it caused the electricity from the motor to escape into an iron pipe, resulting in the injury complained of, is sufficient to take the case to the jury, and upon a motion to nonsuit, evidence that the injury would likely have occurred if the ground wire had not been removed does not affect the question. *Ibid.*

4. *Electricity—Master and Servant—Contributory Negligence—Evidence—Trials—Questions for Jury.*—Where there is evidence that an employee of an electrically driven plant received a shock to his injury from an iron pipe, while in the discharge of his duty in the usual manner, caused by a defect in the electric motor or appliances, with which he was unfamiliar and which it was no part of his duty to operate, and also evidence that before doing the act whereby he was injured he could first have shut off the current at the switch and prevented the injury, the issue of contributory negligence was properly left to the determination of the jury. *Ibid.*

5. *Master and Servant—Railroads—Safe Place to Work—Unusual Dangers—Defects—Promise to Repair—Continuing to Work—Assumption of Risks—Evidence—Instructions.*—The plaintiff was injured while engaged in the performance of his duties as defendant railroad company's locomotive engineer, caused by the explosion of a water-glass placed in his cab, as a part of the appliances of the locomotive to show the quantity of water in the boiler. There was evidence tending to show that a guard glass to the water gauge was missing, which was used for the purpose of protecting engineers from injury of the character inflicted in this case; that plaintiff notified the proper official of the defendant that it was gone, asked

MASTER AND SERVANT—*Continued.*

for another, and was informed that there were none in stock, but one would be gotten from Portsmouth. This having been decided in the United States Supreme Court on *certiorari*, 233 U. S., 492, a new trial awarded defendant, from which the present appeal comes, it is *Held*, that the case was properly tried on the principles therein declared, and no error was committed by the trial judge in his instruction to the jury, in substance, that the employee does not assume risks of a dangerous occupation not naturally incident thereto until he becomes aware of the defect or disrepair, or unless a man of ordinary prudence under the circumstances would have observed and appreciated the unusual danger; that if he continues work under the master's promise to repair for a time reasonably necessary to make it, he does not assume the risk of his employment unless the danger be so imminent that no ordinarily prudent man would continue therein under the promise to repair. *Horton v. R. R.*, 108.

6. *Master and Servant—Negligence—Safe Place to Work—Duty of Servant.*—The rule holding the master to accountability in not furnishing his servant a safe place to work does not apply where the servant, an experienced man, necessarily, from the nature of the work, was required, in its various stages, to construct the place with reference to his own safety, and his injury proximately results either from his own negligent act in failing to do so or in taking such reasonable and available precaution for his own safety as the dangerous character of his work required. *Mace v. Mineral Co.*, 143.

7. *Same—Trials—Evidence—Nonsuit.*—In an action to recover damages for the alleged negligent killing of the plaintiff's intestate, the evidence tended to show that the intestate, on account of his experience and knowledge, had been employed by the defendant as foreman in its feldspar and mica mine, having sole charge and direction of those doing the mining; that in directing the work and assisting in digging out a piece of mica, the wall was undermined, causing it to fall on him and kill him. *Held*, a judgment of nonsuit upon the evidence was properly allowed. *Ibid.*

8. *Master and Servant—Safe Place to Work—Negligence—Evidence—Questions for Jury.*—It is the duty of an employer to furnish his employee a safe place to work, and the evidence in this case tending to show that the plaintiff was employed to work in the defendant's veneer factory on a narrow platform between large vats of boiling water where the logs were placed for preparation and handling, in a certain manner, and that the injury was caused by the defendant not replacing a guard rail around the vats for the safety of an employee while at work, it is held that the instructions of the court applying the rule of the prudent man were properly given upon the issue of defendant's actionable negligence, placing the burden of proof on the plaintiff. *Lynch v. Veneer Co.*, 169.

9. *Master and Servant—Safe Appliances—Custom—Rule of Prudent Man.*—The employer's furnishing to his employee the customary safety appliances with which to do his work is not the sole test of his responsibility, for they should also be such as commend themselves to an ordinarily prudent man. *Ibid.*

10. *Master and Servant—Negligence—Evidence—Trials—Questions for Jury—Nonsuit.*—In an action to recover damages for the alleged

MASTER AND SERVANT—*Continued.*

negligent killing of plaintiff's intestate employed to work in the defendant's mine, there was evidence tending to show that up to ten days of the death of the intestate the defendant had used a "bucket" operated by steam power to haul up the ore and employees from a 250-foot shaft, using certain different signals before hauling up the ore and employees; and without change of rules, defendant put in an appliance known as a "skip," which ran upon iron rails, in place of the "bucket," without notifying the operator of the hoisting engine that the use of the "skip" was forbidden the employees; that the defendant and his foreman rode upon the "skip" under the same rules applying to the "bucket"; that the skip was derailed at a distance of 50 feet up the shaft, and threw the intestate down to his death, and that the customary signals had been exchanged with the "hoisterman" operating the engine that employees were on the "skip," and that the "skip" could have been rendered safe with a simple device. *Held*, sufficient upon the question of actionable negligence upon the question of actionable negligence to be submitted to the jury, of the permissive use of the skip, and defendant's motion to nonsuit was properly refused. *Hardister v. Richardson*, 186.

11. *Master and Servant—Negligence—Dangerous Appliances—Invitation Implied.*—In an action for damages for the negligent killing of plaintiff's intestate, an employee in defendant's mine, in being thrown from a "skip" while riding on it to the surface of the ground, it is held that the defendant and his superintendent riding on the "skip" in the same manner was an implied invitation to the employees to do so, in the absence of evidence to the contrary. *Ibid.*

12. *Master and Servant—Negligence—Dangerous Appliance—Res Ipsa Loquitur—Evidence—Instructions.*—Where an employee in a mine is killed while coming to the surface of the earth on a device called a "skip" operated by power, and in the customary way, which could have been made safe by the use of a simple device; and the death was caused by the "skip" jumping the rail and throwing the intestate to the bottom of the shaft, it is *Held*, that the doctrine of *res ipsa loquitur*, with the other circumstances of the case, should be submitted to the jury upon the issue of defendant's actionable negligence. The charge in this case is approved. *Ibid.*

13. *Master and Servant—Contributory Negligence—Infants—Trials—Evidence—Instructions.*—In an action to recover damages of a railway company for the negligent killing of plaintiff's intestate, a member of its section crew, there was evidence that the intestate, a boy between 15 and 16 years of age, was sent out to flag an approaching train, and was struck by this train and killed while endeavoring to do so. *Held*, the degree of care required of the intestate upon the issue of contributory negligence is that which a boy of his age and knowledge would have taken in the exercise of ordinary prudence, under the circumstances, also requiring that his contributory negligence, if established, should be the proximate cause of the injury; and an instruction which leaves out of consideration the elements of age, experience, and proximate cause constitutes reversible error. *Raines v. R. R.*, 189.

14. *Master and Servant—Railroads—Flagging Train—Contributory Negligence—Proximate Cause.*—Where the plaintiff's intestate, an employee of defendant railroad company, has been run over or killed

MASTER AND SERVANT—*Continued.*

by an approaching train he had been sent out to flag, the negligent failure of the defendant's employees thereon to stop the train, after discovering intestate's dangerous position, will be regarded as the proximate cause of the injury, though the intestate himself may have theretofore been negligent in placing himself in such perilous position. *Ibid.*

15. *Master and Servant—Federal Employer's Liability Act—Contributory Negligence.*—The Federal Employer's Liability Act does not change the doctrine of contributory negligence except as to its legal effect upon the issue of damages, in reducing the amount as indicated in the act instead of being a defense to the action. *Ibid.*

16. *Master and Servant—Federal Employer's Liability Act—Reasonable Expectation—Measure of Damages—Instructions.*—The measure of damages recoverable by the father of an employee of a railroad company under the Federal Employer's Liability Act is according to the reasonable expectation of the benefit which would accrue to the parent by the continuance of the life in question, and an instruction is erroneous which requires the plaintiff to satisfy the jury by the greater weight of the evidence that the intestate would have continued to contribute to the support of his father, and that, in that event, they should find the present worth of such contributions from the time he was killed. *Ibid.*

17. *Master and Servant—Federal Employer's Liability Act—Reasonable Expectation—Evidence.*—In an action by the father to recover damages for the negligent killing of his minor son, under the Federal Employer's Liability Act, there was evidence that the intestate was a boy in good health, earning $1.10 per day, contributed regularly to the support of his father; was sober, industrious, of the average intelligence for his age; that his conduct towards his father indicated a proper conception of his filial duty. *Held*, sufficient to be submited to the jury upon the right of recovery for the reasonable expectation which the father had of benefit or pecuniary aid, or other advantage of gift or inheritance, if the death of the intestate had not been negligently caused by the defendant. *Ibid.*

18. *Master and Servant—Duty of Master—Safe Appliances—Defects—Evidence—Nonsuit.*—In an action to recover damages for a personal injury alleged to have been inflicted on an employee by the employer in his negligent failure to provide proper appliances, etc., it is necessary for the plaintiff to show the defective condition, that it was the proximate cause of the injury, and that the defendant knew thereof or should have discovered and repaired it in proper time; and the evidence in this case is held insufficient where the driver of a coal delivery wagon used a plank as a seat, upon failure of the employer to provide one; that owing to a defect the sides of the wagon spread apart and caused the injury complained of. *Bradley v. Coal Co.*, 255.

19. *Criminal Law—Master and Servant—Tenant or Cropper—Interpretation of Statutes.*—One who is a tenant or cropper of another is not his servant, within the meaning of Revisal, sec. 3365, making it an indictable offense to entice a servant to leave his master. *State v. Etherdige*, 263.

20. *Railroads — Master and Servant — Negligence — Defective Coupler — Duty of Master—Inspection—Proximate Cause.*—While engaged in

MASTER AND SERVANT—*Continued.*

the duty of cutting out a defective car in the defendant's train, the plaintiff, an employee on the defendant's local switch engine, was standing on the rear footboard of the locomotive, and, when it backed up to the car for the purpose of being coupled thereto by the plaintiff, his foot was caught between the bumpers of the car and crushed; there was proof that the injury was caused by a defect in the footboard of the engine and defects in the coupling, *i. e.*, drawheads, lock pins, and lift levers. Under these facts, an instruction was held correct to this effect, that if the jury should find that the coupler was not defective, they should answer the first issue "No"; and this would also be their answer to the issue if they found the coupler to be defective, but that the defect was not due to the defendant's negligence in failing to exercise proper care as to its inspection and repair, or that its negligence, if any, had not contributed proximately to the plaintiff's injury. *Sears v. R. R.*, 446.

21. *Master and Servant—Railroads—Negligence—Federal Employer's Liability Act—State Statute—Contributory Negligence—Assumption of Risks—Trials—Instruction.*—This action for damages for a personal injury to an employee, which was alleged to have been negligently inflicted by a railroad company, and caused by defective couplers on its cars, coming within the intent and meaning of both the Federal Employer's Liability Act, the Defective Appliances Act, and also our statutes of 1913 and 1897, an instruction to the jury that if the injury was caused by a defective coupler, due to the defendant's negligence, contributory negligence would not defeat his recovery, was correct; and the same would apply to assumption of risks under our law, as well as under the Federal statutes. *Ibid.*

22. *Master and Servant—Employee—Vice Principal—Fellow-Servant—Joint Negligence—Trials—Principal—Burden of Proof.*—Where the negligence of the master and a fellow-servant concur in producing an injury, the injured employee, himself being free from blame, can recover judgment from either or both; but where the negligence of the employer is made to depend upon an order of his vice principal or manager, his negligence must first be established, having regard to the character of the order, the position and authority of the person to whom it was given, and the attendant circumstances. *Gregory v. Oil Co.*, 454.

23. *Master and Servant—Employee—Vice Principal—Negligence—Orders to Servant—Remote Damages.*—Where, acting under the orders of the manager of a cotton-seed oil plant, the assistant manager goes upon a platform whereon bales of cotton are thrown at frequent intervals from the door of a ginhouse elevated above, the time being at night and the platform insufficiently lighted by the light from the ginhouse door, and the assistant manager, being in charge, tells the hands in the door to look out for him, in which they acquiesce, but, while getting the samples, the assistant manager is injured by a bale of cotton being thrown upon the platform through the door and rebounding upon him, which is the negligence alleged in his action to recover damages of the company. *Held*, the defendant, company is not held to reasonably anticipate the conditions under which the injury occurred, or that it would result therefrom, and the damages, being too remote, are not recoverable. *Ibid.*

MASTER AND SERVANT—*Continued.*

24. *Master and Servant—Employer—Duty of Master—Safe Place to Work—Reasonable Care.*—The master may not delegate to another his duty to provide his servant a safe place to work, but this does not require him to provide an absolutely safe place for the purpose, or insure the safety of his servant, the measure of his duty being that he should exercise proper care in providing a safe place to work. *Ibid.*

25. *Master and Servant—Duty of Master—Negligence—Safety of Employee—Ordinary Tools and Methods—Anticipation of Injury.*—The requirements that the master, in the exercise of ordinary care, should provide for his servant a reasonably safe place to work, and furnish him with tools and appliances safe and suitable for the work in which he is engaged, chiefly apply in the case of machinery more or less complicated, and more especially when driven by mechanical power, and not always to the use of everyday tools or to ordinary everyday conditions requiring no special care, preparation or prevision, where the defects are readily observable, and there was no reason to suppose that the injury complained of would result. *Bunn v. R. R.*, 648.

26. *Same—Railroads—Repairing Cars—Inspection.*—Where, in an action by an employee of a railroad company to recover damages for a personal injury, the evidence tended only to show that the plaintiff and another contracted by piece work to repair cars marked for repair by the defendant's inspector, without supervision by the defendant; that the plaintiff and his coemployee were skilled and experienced in that kind of work; that they were to replace rotten parts of or certain timbers of the car and had loosened the weatherboarding on one side thereof, and this side fell upon the plaintiff and injured him when he was taking out the last nails and when his coemployee had gone to get hands to lift down the side of the car, by reason of some rotten uprights holding the car sides, which had not been discovered: *Held*, a judgment of nonsuit was proper, no evidence of actionable negligence having been shown, the defects complained of being more readily discoverable by the plaintiff, and not within the reasonable anticipation of the defendant. *Ibid.*

27. *Same—Nonsuit—Trials—Evidence.*—In this case, it appearing that the plaintiff has shown no evidence of actionable negligence on the part of the defendant railroad for an injury received by the side of the car which he, an experienced workman, was working on, falling upon him, it is further held that the plaintiff's contention is unavailing, upon the question of nonsuit, that he would have been in a position to have avoided the injury except for débris left there about 18 inches high from the ground, it appearing that the débris was usually removed by the defendant's employees after the cars had been repaired, or in cleaning up the yard, and requested in this instance only for the purpose of putting a new sill in the car, and not as a matter of plaintiff's safety; and that the injury would not thereby have been prevented under the surrounding conditions, had the débris been removed, or that its presence or absence would naturally increase the danger or avoid the injury, if the work had been done in a proper way or with reasonable care. *Ibid.*

28. *Railroads—Master and Servant—Contributory Negligence—Damages.*—Under our statute, Laws of 1913, chapter 6, the question of con-

MASTER AND SERVANT—*Continued.*

tributory negligence, in an action by an employee of a railroad against the company to recover damages for a personal injury, is only significant on the issue of damages, and does not afford the defendant a complete defense. *Ibid.*

MEASURE OF DAMAGES. See Damages.

MECHANICS' LIENS.

1. *Mechanics' Liens—Pleadings—Amendments—New Contract—Material Furnished—Direct Obligation.*—Amendments to pleadings which substantially set up a new cause of action are not allowable by the trial judge as a matter within his discretion, but this does not apply when the amendment only adds to the original cause of action; as where an action is brought to establish a mechanic's lien, alleging that the materials, etc., were furnished the subcontractor, and an amendment is permitted alleging in effect that they were furnished to the contractor under an agreement that the owner would pay for materials, etc., purchased by the contractor, when it was ascertained that the latter was financially unable to complete the building according to the original contract. *Hardware Co. v. Banking Co.*, 744.

2. *Same—Court's Discretion—Reference—Findings by Judge—Evidence—Appeal and Error.*—It is the policy of our Code procedure to liberally allow amendments, so that causes may be tried upon their merits and avert failure of justice, and to that end, when the amendments do not substantially set up a new cause of action, it is within the reasonable discretion of the trial judge to allow them after verdict or judgment so as to conform the pleadings to the facts proved; and where, after the report of a referee in a cause referred, the trial judge permits amendments, consolidates the case with others, and, as thus consolidated, rerefers them, it is within the reasonable discretion of the trial judge, upon the hearing of the referee's report of the consolidated cases, to permit the other plaintiffs to amend according to the amendments theretofore filed. *Ibid.*

3. *Mechanics' Liens—Abandonment of Contract—New Contract—Direct Liability—Materials Furnished—Principal and Agent—Undisclosed Principal—Consideration.*—Where an action to enforce against the owner a lien of a materialman has been referred, and the judge, upon the coming in of the report, and from the facts stated therein and supported by the evidence, finds that the owner and contractor agreed that the latter, who was financially unable to complete his contract, should thereafter purchase the materials, etc., for which the owner should pay. *Held*, the agreement thus made in effect constituted the contractor the agent for the owner, and that the materialman, in consideration of the benefits the owner had received, had the right to sue thereon and establish a direct obligation from the owner to him; and *Further held*, that it made no difference as to whether the materialman knew of this new agreement at the time he furnished the materials, under the doctrine that an undisclosed principal may be bound by the simple executory contracts of the agent, made for his benefit, when he is afterwards discovered to be such. *Ibid.*

MENTAL CAPACITY. See Deeds, 26, 28; Appeal and Error, 32; Trials, 15; Wills, 7, 8.

MONOPOLY. See Physicians, 2.

MORTGAGES. See Judgments, 19, 20; Judicial Sales, 1; Trusts, 16, 17, 18; Corporations, 2, 4; Limitation of Actions, 1; Vendor and Purchaser, 6.

MORTGAGOR'S POSSESSION. See Limitation of Actions, 2.

MOTIONS. See Judgments, 13, 14, 22; Appeal and Error, 22, 55; Courts, 14; Affray, 4; Appearance, 1; Evidence, 4; Indictment, 3.

MUNICIPAL CORPORATIONS. See Deeds, 18, 19, 21, 39; Pleadings, 9; Evidence, 7; Elections, 1.

1. *Municipal Corporations—Cities and Towns—Streets—Negligence—Defects—Notice.*—The liability of an incorporated town for injuries caused by the faulty condition of its streets depends upon whether the town through its proper officers had actual or constructive notice of the defect causing the injury or could have avoided it in the exercise of reasonable diligence. *Foster v. Tryon*, 182.

2. *Same—Trials—Questions for Jury.*—The doctrine of constructive notice of a defect in the street of an incorporated town which will render it liable for an injury thereby proximately caused, rests upon its duty to inspect and repair its streets, and whether in the reasonable exercise of this duty the defect should have been discovered and repaired in time by the proper officers of the town, ordinarily presents a question for the determination of the jury, depending upon the circumstances of each particular case. *Ibid.*

3. *Same—Evidence—Nonsuit.*—The plaintiff's intestate was killed on one of the principal streets of the defendant incorporated town by a fall of the horse upon which he was riding, caused by the foot of the animal entering a hole in the top of a culvert extending across the street. There was evidence from an examination of the culvert that it had been faultily constructed in the respect complained of, that the defect was readily discernible, and located where several of the aldermen were accustomed to pass; that it had existed for several days, and on the day in question and an hour or two before the injury it had been called to the attention of the officer of the defendant whose duty it was to repair it, and when he was within 300 yards of the place. *Held*, evidence of defendant's actionable negligence sufficient to take the case to the jury, and defendant's motion to nonsuit thereon was properly denied. *Ibid.*

4. *Municipal Corporations—Cities and Towns—Bonds—Legislative Control—Necessaries—Constitutional Law.*—A legislative authorization to a municipality to issue bonds for paving and generally improving the streets; to enlarge and extend its waterworks system; to enlarge and better equip its electric light plant; to install an electric fire-alarm system, and to erect municipal buildings, is for necessary expenses, and not subject to the restrictions of our Constitution, Art. VII, sec. 7, requiring that the question of the issuance of the bonds be submitted to the vote of the people. *Kinston v. Trust Co.*, 207.

5. *Same—Validating Acts.*—Municipalities are very largely subject to legislative control as to the issuance of bonds and other matters governmental in character, and they must observe the statutory requirements, charter or otherwise, under which they act, it remaining in the power of the Legislature to remove by subsequent legislation

MUNICIPAL CORPORATIONS—*Continued.*

irregularities by reason of the violation or nonobservance of requirements upon the municipality made in a previous act, when no vested rights have supervened and no mandate of the Constitution has thereby been violated. *Ibid.*

6. *Same—Immaterial Recitations—Charter Provisions—Ordinances.*—Where a bond issue for necessary expenses has been submitted to and approved by the voters of a city, according to a statutory requirement, but it appears that it is in violation of the city's charter requiring that no ordinance or resolution respecting such matters be finally passed on the date of its introduction, it is within the authority of a subsequent Legislature to validate the issuance of the bonds by direct legislation, not requiring the proposition to be again submitted to the voters; nor is objection material that the validating act refers to bonds already delivered, when in fact they had only been prepared and were refused by the purchaser. *Ibid.*

7. *Municipal Corporations—Filing Claims—Unliquidated Damages—Torts—Interpretation of Statutes—Cities and Towns.*—Revisal, section 1384, requiring claimants against a city or town to file their claims with the proper municipal authorities, has no application to actions *ex contractu*, where the damages are unliquidated, nor to torts. *Sugg v. Greenville*, 606.

MURDER. See Homicide.

MUTUAL MISTAKE. See Deeds, 45.

NAVIGABLE WATERS.

1. *State's Public Lands—Entry—Requisites—Navigable Waters—Interpretation of Statutes.*—Originally lands covered by navigable waters were not subject to entry, but by the act of 1854-5, ch. 21, this was changed, permitting entries to be made under certain restrictions, giving to incorporated towns the power to "regulate the line of deep water, to which entries may be made," when the riparian lands are situate therein. By Public Laws 1893, ch. 17, the words "to which entries may be made" were changed so as to read "to which wharves may be built." *Held*, the statutes are strictly construed with reference to the conditions under which entries may be made, and the entry does not confer an absolute and unrestricted title, but only an easement for the purposes specified in the statute, Revisal, sec. 1696, or, perhaps, an estate upon condition. *R. R. v. Way*, 1.

2. *Entries of Land Under Navigable Waters—Rights of Riparian Owners and Others Therein.*—Lands under navigable waters are not subject to entry except in the manner prescribed by the statute, and in strict conformity therewith, and then only by the riparian owner not being subject to entry by those having no interest in the banks or shores. *Ibid.*

3. *Navigable Waters—Lands—Grants—Interpretation of Statutes.*—A grant of land covered by navigable waters, as permitted by statute, can have no further effect than the statute allows, and the grant will be construed as if the statute had been written into it. Revisal, sec. 1696. *Ibid.*

NECESSARIES. See Municipal Corporations, 4.

NEGLECT. See Appeal and Error, 55; Judgments, 23.

NEGLIGENCE. See Appeal and Error, 20; Evidence, 1; Master and Servant, 4, 6, 8, 10, 11, 12, 13, 14, 15, 20, 21, 22, 23, 25, 28; Commerce, 4, 5, 8; Municipal Corporations, 1; Carriers of Passengers, 4; Pleadings, 7, 9; Telegraphs, 4, 6, 9; Bailment, 9; Railroads, 10, 12, 13, 14, 16, 17, 18; Trials, 7, 9; Carriers of Goods, 3; Torts, 1.

1. *Negligence — Automobiles — Speed Regulations — Proximate Cause.*— The mere fact that the speed of an automobile exceeded that allowed by chapter 107, Laws 1913, at the time of collision with a railroad train at a public crossing, does not of itself prevent a recovery by the owner, where there is evidence of negligence on the part of the railroad, because it would, among other things, withdraw the question of proximate cause from the jury. *Shepard v. R. R.*, 239.

2. *Negligence.*—This action to recover damages for a personal injury was tried under well settled principles relating to defendant's negligence under the evidence and correct instructions, and no error is found. *Setzer v. Plank*, 253.

3. *Negligence — Surgical Operations — Proximate Cause — Trials — Evidence.*—Where there is some evidence that, as the result of a personal injury, which was alleged to have been negligently inflicted by the defendant on its employee, two surgical operations were performed, and that the second one was made necessary by reason of the defendant's negligence and as a proximate result thereof, it is proper for the trial judge to refuse to instruct the jury that in no view of the case was the defendant liable for the additional suffering, etc., caused by the second operation. *Sears v. R. R.*, 446.

NEGOTIABLE INSTRUMENTS. See Bills and Notes.

NEWLY DISCOVERED EVIDENCE. See Appeal and Error, 8.

NEW TRIAL. See Appeal and Error, 8, 30.

Appeal and Error — Prejudicial Error — New Trial.—Error committed by the trial judge must be prejudicial to be reversible and to entitle the appellant to a new trial, for if he is not hurt by the ruling to which exception was taken, there is no reasonable ground of complaint. *In re Craven*, 561.

NONRESIDENT. See Attachment; Process.

NONSUIT. See Trials, 1, 12; Courts, 5, 12, 13; Appeal and Error, 37; Judgments, 20; Master and Servant, 3, 7, 10, 18, 27; Electricity, 1; Indictment, 2; Municipal Corporations, 3; Carriers of Goods, 5; Railroads, 16, 20; Vendor and Purchaser, 14.

NOTARIES PUBLIC. See Constitutional Law, 6, 7.

NOTICE. See Appearance, 1; Criminal Law, 1; Intoxicating Liquors, 6; Municipal Corporations, 1; Public Lands, 10; Trusts, 1; Drainage Districts, 5; Courts, 14; Deeds, 47; Bills and Notes, 6, 7; Elections, 1; Deeds, 19, 21.

NUISANCE. See Pleadings, 9.

OBJECTIONS. See Appeal and Error, 4, 7, 51, 52, 56; Drainage Districts, 3, 5.

OFFICERS. See Bills and Notes, 10.

1. *Public Officers — Holding Two Offices, Etc. — Constitutional Law — Penalties—Interpretation of Statutes.*—Ordinarily one who occupies a public position which requires him to perform legislative, execu-

OFFICERS—*Continued.*

tive, or judicial acts is a public officer within the intent and meaning of our State Constitution, Art. XIV, sec. 7; and a rural mail carrier being appointed by the Postmaster General of the United States, the head of his department, for the performance of a continuous and not an intermittent service of carrying the mails, and coming within the classification of officers outlined in the Constitution as construed by the Supreme Court of the United States, is subject to the penalty imposed by Revisal, sec. 2365, when in addition to such position he also holds that of a constable. *S. v. Boone*, 132 N. C., 1108, where the incumbent operated a star route under contract with a contractor of the Government, cited and distinguished. *Groves v. Barden*, 8.

2. *Public Officers—Interpretation of Statutes.*—In determining whether the incumbent of a certain position is an officer within the meaning of Art. XIV, sec. 7, of our Constitution, the fact that the Legislature in creating the position have declared it an office or employment is entitled to consideration, though not conclusive or determinative. *Ibid.*

3. *Public Officers—Judicial and Discretionary Powers—Corruption—Malice—Allegation—Proof—Pleadings.*—Public officers are not personally liable to persons specially injured by their acts done in the exercise of judicial or discretionary powers conferred on them by statute, unless it is alleged and shown that in doing the acts complained of they did so corruptly and with malice. *Hipp v. Farrell*, 551.

OPINIONS. See Trials, 6.

ORDERS. See Appeal and Error, 36.

ORDINANCES. See Municipal Corporations, 6.

PARENT AND CHILD. See Wills, 9.

PAROL EVIDENCE. See Contracts, 2, 6, 11; Trusts, 1, 2, 3, 10.

PARTIES. See Costs, 1; Deeds, 44; Torrens Law, 1; Torts, 1; Bills and Notes, 3; Courts, 3; Public Lands, 10.

PARTITION. See Deeds, 23.

PAYMENT. See Judgments, 20; Contracts, 22; Limitation of Actions, 3; Trusts, 10.

PEDESTRIANS. See Railroads, 11, 18.

PERSONALTY. See Contracts, 15; Logs and Logging, 1.

PHYSICIANS.

1. *Physicians—Licensed Practitioners—Nondrug-giving Practitioners—Examination—License—Criminal Law.*—Under the provisions of chapter 92, Laws 1913, amending chapter 764, Laws 1907, Pell's Revisal, secs. 4505a, 4505h, 4505m, those who practice and receive pay for the treatment of human diseases without the use of drugs, and who are not licensed osteopaths, are required to take the examination and receive the license provided for in the later statute, with the exceptions therein stated, *i. e.*, licensed physicians, Christian

PHYSICIANS—*Continued.*

scientists, masseurs or following the orders of a licensed drug-giving physician; hence one engaged in the practice of "chiropractic and suggestotherapy," or treating human diseases by manipulating the spine, or treating nervous diseases by mental suggestion, without the examination and license prescribed, are guilty of a misdemeanor. *State v. Siler*, 314.

2. *Same—Monopoly—Constitutional Law.*—Laws 1907, chapter 764, Pell's Revisal, secs. 4045a, 4505h, 4505m, as amended by chapter 92, Laws 1913, extending the requirement of examination and license to other nondrug-giving practitioners for compensation, than osteopaths, with the exceptions stated in the later statute, making the violation of its provisions a misdemeanor, was for the protection of the people, and was not intended to give, nor does it give, those who comply with the law a monopoly, inhibited by the Constitution. *Ibid.*

PLATS. See Deeds, 18, 19.

PLEAS IN BAR. See Trusts, 14.

PLEADINGS. See Highways, 2, 4; Judgments, 3, 4, 18; Officers, 3; Torrens Law, 1; Appeal and Error, 17; Bills and Notes, 4; Courts, 1, 2, 6, 14; Taxation, 4; Wills, 14; Issues, 1; Mechanics' Liens, 1; Contracts, 18; Deeds, 36, 37, 45; Evidence, 8.

1. *Pleadings—Evidence.*—The introduction of evidence as to the terms agreed upon by the partners in dissolution of their business is not objectionable for the want of allegation in the pleadings, when the testimony objected to is practically set out therein. *Spencer v. Bynum*, 119.

2. *Pleadings—Allegations—Title to Lands.*—Where the plaintiff alleges in his complaint that he is the owner of certain lands, which is denied by the defendant, he is entitled to recover them upon the strength of any superior title he may have thereto which he is able to establish. *Taylor v. Meadows*, 124.

3. *Same—Deeds and Conveyances—Devises—Tenants in Common—Evidence—Estoppel.*—An owner of lands mortgaged a part thereof, the mortgage was foreclosed, and the *feme* plaintiff acquired a deed as purchaser at the sale. The defendant claimed from the same owner a part of the original tract by mesne conveyances. The lands of both parties were either adjoining or adjacent to each other. The plaintiff further put in evidence the will of the original owner disposing only of personal property, testifying that male plaintiff was one of the heirs at law. The plaintiff testified on the trial that in establishing the true divisional line under the descriptions in the foreclosure deed to *feme* plaintiff she would be the owner of the *locus in quo*. *Held*, the plaintiff was entitled to recover his interest in the lands as one of the heirs of his father as tenant in common with the other heirs, if the foreclosure deed did not cover the lands in dispute; and is not concluded by his testimony that the land was included in the boundaries of said deed, and it was reversible error for the trial judge to charge the jury that his right of recovery depended entirely on the question raised by the issue as to the location of the true divisional line, according to the foreclosure deed. *Ibid.*

PLEADINGS—*Continued.*

4. *Pleadings—Counterclaim.*—A counterclaim which only alleges that the plaintiff is indebted to the defendant, without alleging further the nature, extent, and kind of indebtedness, and how it arose, is imperfectly pleaded, and should be disregarded. *Bank v. Northcutt*, 219.

5. *Same—Banks and Banking—Bills and Notes—Parties.*—Where in an action on a note brought by a bank which had taken it with other papers as collateral to a note from the local bank of deposit and original discount, an allegation is made in the answer by way of offset or counterclaim that the local bank was indebted to the defendant; that no demand for payment of its note had been made; that plaintiff had more than sufficient collateral to secure the note, etc., states no valid counterclaim as against the local bank, and the failure of the plaintiff to have made it a party defendant is immaterial. *Ibid.*

6. *Pleadings—Counterclaim—Vague Allegations.*—The allegations of a counterclaim or set-off in the answer in this case is held to be too vague and indefinite. *Bank v. Northcutt, ante*, 225; *Bank v. Hill*, 235.

7. *Contributory Negligence—Pleadings—Trials—Burden of Proof—Negligence.*—Contributory negligence, when relied upon as a defense, must be alleged in the answer, and the burden of proof will be on the defendant to establish it. *Medlin v. Tel. Co.*, 495.

8. *Pleadings—Variance—Proof—Statutes.*—Where the complaint in an action against a telegraph company for damages for its negligent delay in the transmission and delivery of a message alleges that the defendant received the telegram sued on at its office at A., and the evidence tends to show that it was received at B., a near-by point, and telephoned to A. by the defendant's agent there, and there is nothing to indicate that the defendant was misled or was unprepared to meet the evidence introduced, or was thereby prejudiced. *Held*, the variance between the allegation and the proof was neither material nor fatal. Revisal, sec. 515. *Brown v. Tel. Co.*, 509.

9. *Negligence—Pleadings—Demurrer—Municipal Corporations—Secondary Liability—Streets and Sidewalks—Nuisance.*—A complaint in an action to recover damages for an injury to a nine-year-old child states a good cause of action when it alleges that the defendant negligently emptied, from its manufacturing plant, quantities of hot water which flowed in an uncovered and unprotected ditch, without any sign or warning, along the edge of a city's sidewalk, obscured by vegetable growth and the steam arising from the hot water, and that the child was seriously injured by falling therein and being scalded; for such, when established, constitute actionable negligence, from the consequences of which the defendant may not relieve itself upon the ground that such conditions amounted to a nuisance, which the city, its codefendant, should have sooner abated, the liability of the city, if any, being secondary to that of the defendant manufacturing company. *Conway v. Ice Co.*, 577.

10. *Pleadings—Amendments—Prayers for Relief—Judgment—Presumption.*—Where an amended complaint has been allowed in the Superior Court and filed, and asks for no relief except by reference to the original complaint, which is not sent up in the record on defendant's appeal, it will be assumed that the prayer corresponded

PLEADINGS—*Continued.*

with the facts stated and was suited to the relief granted, if a prayer was essential. *Bryan v. Canady*, 579.

11. *Same—Record—Appeal and Error—Absence of Prayers for Relief.*—The relief to be granted in an action does not depend upon that asked for in the complaint; but upon whether the matters alleged and proved entitle the complaining party to the relief granted, and this is so, in the absence of any prayer for relief. *Ibid.*

12. *Pleadings—Issues—Matters Alleged—Specific Performance—Separate Conveyances—Equity—Reformation.*—Where the purpose of the suit, as it appears from the matters alleged in the complaint, was to call for a separate deed to a tract of land omitted by the mutual mistake of the parties from the conveyance made in carrying out an option of purchase thereof, and it is the evident intention of the plaintiff, as gathered from the complaint, not to have the deed reformed, but to compel a conveyance of the tract omitted, an issue involving the right of the plaintiff for reformation of the deed does not arise on the pleadings. *Ibid.*

POLICE OFFICERS. See Carriers of Passengers, 2.

POLICE POWERS. See Fish and Oysters, 1; Intoxicating Liquors, 3, 4.

POLICE REGULATIONS. See Lotteries; Taxation, 7.

POSSESSION. See Judicial Sales, 11; Deeds, 14, 36; Landlord and Tenant, 1; Public Lands, 14, 15; Taxation, 5.

1. *Limitation of Actions—Deeds and Conveyances—Color—Adverse Possession — Title Out of State — Twenty-one Years.*—Where in an action to recover lands a party claims under a grant from the State and mesne conveyances, and fails to show a connected paper title by not locating the lands within the description of the grant, it is necessary for him to show adverse possession of a sufficient character for twenty-one years under color to take the title out of the State and vest it in himself. *McCaskill v. Lumber Co.*, 24.

2. *Limitation—Deeds and Conveyances—"Color"—Adverse Possession—Character of Possession—Evidence Sufficient.*—The continuity and character of possession necessary to ripen the title of the claimant under color is held sufficient which shows the paper title of the claimant, that the land was woodland, uncleared and unprofitable to cultivate, and that he and those whose previous possession inures to his benefit had supplied themselves with wood, of which they used a great deal, and had but little woodland on an adjoining tract whereon they lived; that the land had been bought to obtain this wood supply; that their possession of this character had been continuous for the statutory period, and no adverse claim had been made upon the land before the institution of the present action. *Locklear v. Savage*, 159 N. C., 236, cited and applied. *Ibid.*

POWER OF COURT. See Statute, 1; Courts.

PRAYERS FOR INSTRUCTION. See Trials, 1.

PRESUMPTIONS. See Pleadings, 10; Railroads, 16.

PRIMA FACIE CASE. See Evidence, 10, 11.

PRINCIPAL AND AGENT. See Evidence, 11; Carriers of Goods, 1; Telegraphs, 3, 10; Vendor and Purchaser, 10; Mechanics' Liens, 3; Insurance, 5.

1. *Principal and Agent—Evidence of Agency—Ratification.*—The statement by the secretary and treasurer of a corporation that an account rendered to it was correct is some evidence of the authorized act of one having made the contract to bind the company thereto as its agent. *Observer v. Remedy Co.*, 251.

2. *Principal and Agent—Evidence of Agency—Books.*—Where a corporation is sought to be bound as principal for the acts of another, it is not reversible error for the trial judge to refuse to strike out the testimony of a witness, on the question of agency, that it was understood that the one acting was the authorized agent, when the corporation books, introduced in evidence, discloses that he was such agent at the time. *Ibid.*

3. *Principal and Agent—Appeal and Error—Harmless Error.*—A corporation sought to be bound by the acts of one purporting to be its agent, it is not reversible error for the judge to charge the jury that a person may act as the agent for half a dozen corporations, and, apart from the fact of its being true in this case, it could not have affected the verdict. *Ibid.*

PRINCIPAL AND SURETY.

Debtor and Creditor — Deeds and Conveyances — Husband and Wife — Fraudulent Intent—Evidence—Principal and Surety.—Where the plaintiff seeks to set aside as fraudulent as against himself a deed to lands made by the husband to his wife, upon the ground that he with another became surety on the defendant's note, the cosurety became insolvent, and he paid the note in full, and that the husband had not retained sufficient property to pay his debts at the time of the conveyance, evidence as to the reasonable belief of the defendant that the cosurety was solvent at the time of the conveyance is competent; and as to the value of the property retained by the defendant, it need not have been sufficient to include the full amount of the note, so far as the plaintiff was concerned, he at the time being liable only, as surety, for half thereof. *Shuford v. Cook*, 52.

PROBATE. See Contracts, 10; Husband and Wife, 1, 4.

PROCEDURE. See Constitutional Law, 2; Trials, 4.

PROCESS. See Sheriffs, 1; Courts, 15.

Process—Nonresidents — Summons — Publication — Property — Courts—Jurisdiction.—A valid service of summons by publication cannot be made on a nonresident defendant unless he has property within the State which is brought under the control of the court; and where in attachment proceedings it appears that no property of the defendant has been reached or levied on, and the defendant has entered a special appearance for the purpose, his motion to dismiss will be allowed. *Everitt v. Austin*, 622.

PROOF. See Pleadings, 8; Evidence.

PROPERTY RIGHTS. See Lotteries, 4.

PROXIMATE CAUSE. See Railroads, 15; Negligence, 1, 3; Telegraphs, 9; Master and Servant, 14.

PUBLICATION. See Process.

PUBLIC LANDS.

1. *Public Lands—State's Lands — Grants — Surveys — Lines and Boundaries — Extrinsic Evidence — Deeds.*—The principle applied to the construction of grants of land from the State, or by deed, that the actual location of a line made before or cotemporaneously in a survey will control a variance made in the description of the grant or deed, does not obtain unless the line has been marked and cornered for the purpose of a correct description in the grant or deed, and then only when the line marked is so connected with the deed, either by intrinsic or extrinsic evidence, as to create a presumption as to the intent of the grantor that it should be one of the boundaries. *Lumber Co. v. Lumber Co.*, 80.

2. *Same—Intent.*—Where the application of the principle is permissible to show by parol evidence that the lines described in a State's grant of lands is not in conformity with the lines of a survey made in contemplation of the grant, the vital question is the intent of the grantor, and the rule admitting parol evidence should be administered with caution and not carried beyond its well defined limits of serving only to locate the land intended to be conveyed by operating to aid the description contained in the deed. *Ibid.*

3. *Same—Corners—Conduct of Parties.*—In order that the line of a survey may vary the description given in a grant of land, it is required that it should have been run and marked before the execution of the deed or cotemporaneously therewith, and intended by the parties as one of the lines of the lands to be conveyed, and this intention must be clearly inferred from the conduct of the parties in regard thereto, the intention being as essential as the fact that the line was surveyed and a corner made. *Ibid.*

4. *Same—Triangulation.*—Where the parties in an action for lands claim respectively under a junior and senior grant from the State, and the controversy depends upon the location of the dividing line between the two grants, represented on the map by lines from an admitted beginning point, A, the one claiming it to be from A to B and other from A to D, and it appears that the line from A to D was too difficult of survey, and the parties established it by means of triangulation, that is, by running from A to B and then to D, the land in controversy lying within the triangle A, B, and D: *Held*, that it being the intention of the parties that the true line should run from A to D and that the line was partly run from A to B, and a corner made at B was only for the purpose of ascertaining the former line, by the stated method, for the purposes of the description in the grant, the intention of the parties will control the call in the grant for a line from A to B, and especially when the latter is coupled with a call for the line of another tract, which is well established and also is in conformity with other points or corners given in the grant. *Ibid.*

5. *Public Lands—State's Lands — Grants — Extrinsic Evidence—Natural Boundaries—Conflicting Calls—Interpretation.*—Where it is the evident purpose of the grant of land, as gathered therefrom, that one of its lines shall coincide with the line of B and run therewith to

PUBLIC LANDS—*Continued.*

his northeast corner, and corner there at a sugar maple, which line and tree are definitely ascertained and located, it may not by legal interpretation be made to run beyond to a given, fixed, or natural boundary, as in this case, to the "intersection of the head of Defeat Ridge with the Tennessee line," for such would violate the evident intention of the parties, and the language should be construed as if it read, "cornering at B's northeast corner, supposed to be on the Tennessee line at the head of Defeat Ridge" (*Cherry v. Slade*, 7 N. C., 82, cited and applied); and it is *Further held*, that the mere understanding of the parties, without more, as to the location of B's line and northeast corner, cannot control the call, as an actual or practical location of the line. *Ibid.*

6. *Public Lands—Evidence—Junior Grants—Prior Surveys—Boundaries.* While the description in a junior grant may not be evidence of the location of lines and boundaries of a senior grant, the rule does not apply when the survey to establish the line in dispute was made prior to the date of the senior grant; and in this case the map and certificate of survey were properly admitted as evidence in corroboration. *Ibid.*

7. *Public Lands — State's Lands—Entry—Vacant and Unappropriated—Former Grant—Statutes.*—Land once granted by the State to a citizen does not thereafter become vacant and unappropriated within the meaning of the statute, Revisal, sec. 1893, because the State may thereafter have acquired the land without putting it to a special use. *Walker v. Parker*, 150.

8. *State's Lands—Entry—Descriptions—Statutes.*—An enterer on State's lands must file with the entry taker a writing signed by him, giving the location of the lands sought to be entered, nearest water-courses, and remarkable places if any situated thereon, and natural boundaries, if any, of other persons, dividing the lands entered from other lands. (Rev., 1707.) *Ibid.*

9. *State's Lands—Entry Taker — Publication — Protestant — Statutes.*—The entry taker must cause a copy of the entry to be posted and published for thirty days in accordance with the statute, Revisal, sec. 1708, within which time a protest may be filed by one claiming an interest in the lands. *Ibid.*

10. *Same—Notice to Show Cause—Issues—Parties in Interest.*—Upon the filing of a proper protest to the entry, it is the duty of the clerk of the court to issue notice to the enterer upon State's lands to appear at the next term of the court to show cause why his entry shall not be declared inoperative and void (Revisal, sec. 1709; and when this is done, it raises an issue to be heard and determined by the jury. *Ibid.*

11. *State's Lands — Protestant—Allegations — Descriptions — Interests.*—The protestant to an entry of State's lands must allege in his protest that he claims an interest therein, or his protest will be dismissed; and if he claims the lands under a former entry, he must name the grant and describe it with reasonable particularity. *Ibid.*

12. *State's Lands—Protestant—Allegation — Former Grants — Enterer—Burden of Proof.*—Upon allegation, in the protest to an entry of State's lands that a grant thereto had theretofore been issued, the burden is upon the enterer to show to the satisfaction of the jury

PUBLIC LANDS—*Continued.*

that the grant does not cover the lands described in his entry, and upon his failure to do so the grant will not issue upon his entry. *Ibid.*

13. *State's Lands — Former Grant — Entry — Color of Title — Issues.*—A grant of State's lands issued for lands previously granted is void for all purposes, and does not constitute color of title, by express provision of the statute, Revisal, sec. 1699, and a protest to the entry raises the issue of title solely between the enterer and protestant, in which the State is not interested. *Ibid.*

14. *State's Lands — Former Grant—Entry—Protestant—Allegations—Adverse Possession—Limitation of Actions—Burden of Proof.*—Where upon protest to the entry of State's lands it is ascertained that the lands described in the entry are not contained in the former grant, the protestant may show, if he can, and upon proper allegation, that the lands are not vacant and unappropriated by sufficient adverse possession to take the title out of the State and vest it in himself. *Ibid.*

15. *State's Lands—Protestant—Adverse Possession—Limitation of Actions —Burden of Proof.*—If the protestant to an entry of State's lands does not allege in his protest that a grant has previously issued for the lands, but that the land is vacant and unappropriated by reason of adverse possession, the burden of proof upon this allegation is upon the protestant. *Ibid.*

PUBLIC. See Officers, 3.

PUBLIC OFFICERS. See Constitutional Law, 6, 7, 8; Officers.

PUBLIC POLICY. See Statutes, 1; Contracts, 21; Carriers of Goods, 3.

PUNITIVE DAMAGES. See Carriers of Passengers, 3.

PURCHASERS. See Corporations, 6; Courts, 2; Taxation, 6.

QUESTIONS FOR JURY. See Homicide, 2; Libel and Slander, 2; Master and Servant, 1, 4, 8, 10; Municipal Corporations, 2; Trials, 1, 13; Deeds, 26, 28, 38, 41; Appeal and Error, 32; Limitation of Actions, 3; Judgments, 22; Railroads, 20; Telegraphs, 5.

QUESTIONS OF LAW. See Deeds, 38; Courts.

RAILROADS. See Master and Servant, 5, 14, 20, 21, 26, 28; Carriers of Goods and Passengers; Commerce, 6.

1. *Railroads—Right of Way — Duty of Company — Combustible Matter—Fires—Firing Right of Way.*—It is the duty of a railroad company to keep its right of way free from combustible matter, and where in pursuance of this duty the agents of the company burn off the right of way, it is required that they use reasonable care in preventing the escape of the fire to adjoining lands, to the injury of the owners. *Stemmler v. R. R.*, 46.

2. *Railroads — Easements — Rights of Way — Payment of Assessment—Right of Appeal—Statutes — Amendments — Eminent Domain.*—On appeal by a railroad company from the amount of the assessment to be paid the owner of lands for its right of way it is necessary for the company to pay the money into court before building and operating

RAILROADS—*Continued.*

its road [Revisal, secs. 2587, 2567 (4), 2566]; but this does not preclude the right of subsequent legislation to permit by special charter the railroad to appeal without paying the assessment until final judgment. *R. R. v. Ferguson*, 70.

3. *Same—Final Judgment—Taking of Property—Compensation—Constitutional Law.*—Where a legislative charter of a railroad company requires the company to pay the assessment for the right of way into court before acquiring the right to construct its road thereon pending appeal, and thereafter, and subsequent to the general statutes on the subject, an amendment is made by the Legislature, permitting the company, after the amount of compensation has been fixed by certain proceedings provided for, to enter upon the lands for the purpose of constructing its road without condemnation. It is not a taking of private property prohibited by the Constitution, for the title to the right of way does not pass until final judgment and compensation in accordance therewith. *Ibid.*

4. *Railroads—"Safety Appliance Act"—Power Brakes—Local Switching—Interpretation of Statutes.*—The requirements of the Federal "Safety Appliance Act," that railroads in the operation of interstate trains must be equipped with a certain kind of brake, do not apply to the local switching of cars on the company's switch yard, and the failure of the company to provide them in such instances affords no evidence of actionable negligence in an action to recover damages. Instances where interstate trains are being carried by switching crews from one location to another a few miles distant, its final destination, distinguished. *Worley v. R. R.*, 105.

5. *Railroads—Condemnation—Measure of Damages—Diminished Value—Eminent Domain.*—Compensation to the owner of lands acquired by a railroad company in condemnation proceedings is required by law, and includes indirect injuries to the land as well as those of a physical kind which will directly diminish its value, and which are capable of legal proof, and do not rest upon mere conjecture, speculation, or surmise. *R. R. v. Manufacturing Co.*, 156.

6. *Same—Adaptation of Property—Prospective Use.*—The compensation to be awarded the owner of lands for a right of way acquired thereon by a railroad company under condemnation proceedings must be full satisfaction for the diminution in value of the property as a whole, considering the purposes for which it was used, and is not confined to the value of the property in its present state and condition, but should be extended so as to include its adaptation for future uses, and the depreciation of the whole resulting from the use of a part for railroad purposes. *Ibid.*

7. *Railroads—Condemnation—Measure of Damages—Cotton Mills Settlement—Damages to Plant—Employees—Incidental Use.*—Where a railroad company has condemned a right of way over lands used for a cotton mill plant and settlement, it is competent to prove, in showing the consequent depreciation of the value of the whole property, that it had been appreciably affected to its detriment by noises, smoke, cinders, jarring, discomfort, inconveniences, and other like causes incident to the running of the trains on the right of way, and by the risks and dangers of fire and injury to employees and their children; and that the use of the right of way, because of such things, would disorganize its help and tend to drive its operatives away, by

RAILROADS—*Continued.*

rendering their condition uncomfortable, if not intolerable, requiring the substitution of cheaper and inferior labor, thus lowering the standard quality of the output of the mills; but the proof should be confined to the general facts, excluding such particulars as the number of hands the changed conditions would cause to leave, and an estimate of depreciation in value, based upon a capitalization of the pay rolls which will be increased by the evil effects of the right of way and the trains upon the employees and their families. *Ibid.*

8. *Railroads—Condemnation—Measure of Damages—Common Damages—Special Use—Eminent Domain.*—The rule that damages common to all persons along the line of an acquired right of way are not recoverable by the owner in condemnation proceedings does not apply when the land is taken and appropriated to a use which directly impairs its value by reason of the smoke, jarring, danger, etc., because of its peculiar nature or particular enjoyment, though not necessarily in a direct physical way. *Ibid.*

9. *Railroads—Measure of Damages—Evidence.*—Upon the question of compensation to be paid the owner of lands for a right of way acquired under condemnation proceedings, it is competent to show the value of the lands, with their improvements, or of the entire plant, before and after the taking, as tending to show the depreciation caused thereby. *Ibid.*

10. *Railroads—Negligence—Tracks—Trespasser—Licensee—Place of Danger—Warnings.*—A railroad track is, in itself, a warning to those who use it, either as trespassers or licensees, of the danger of walking thereon, or of using it as a roadway, and requires them to observe the ordinary care that a prudent man under the circumstances would use to avoid injury from passing trains, and to leave the track in time to avoid being injured thereby, when the occasion arises. *Treadwell v. R. R.*, 694.

11. *Same—Pedestrians—Stopping Trains.*—A railroad company has the superior right to the use of its track over that of trespassers and licensees walking thereon; and the employees of the company are not required to stop the running of its trains for the public benefit whenever they see a pedestrian upon the track in front of the moving train, and when there is nothing to indicate that he was not in full possession of his faculties. *Ibid.*

12. *Railroads—Trespasser—Licensee—Negligence—Evidence — Headlights —Crossing Signals.*—While a railroad company does not owe it as a duty to a pedestrian using its track as a walkway to give crossing signals, yet its failure to do so and to use a headlight at night may afford some evidence that the train was being negligently run, and sufficient to be considered in an action to recover damages for the negligent killing of a trespasser or licensee on the track and to be submitted to the jury under relevant circumstances. *Ibid.*

13. *Same — Duty of Trespasser — Contributory Negligence.*—Where in an action to recover damages for the negligent killing of the plaintiff's intestate at night by the defendant railroad company's train running without a headlight, and not giving signals of its approach, the questions as to whether there was a headlight, or that the signals were given, and whether the deceased should have seen or heard the train with or without them, are for the jury, when they are relevant to the issue and arise from the evidence; for if the deceased could have

RAILROADS—*Continued.*

seen or heard the train, and did not leave the track, when able to do so, his injury will be attributed to his own fault. *Ibid.*

14. *Railroads—Trespasser—Headlight—Trains Running at Night — Negligence—Evidence—Contributory Negligence.* —The running of a train at night without a headlight is some evidence of negligence, in an action to recover damages for the negligent killing by the train of the plaintiff's intestate, and may support a verdict adverse to the defendant, unless it appears that the deceased actually saw or heard or, by the exercise of ordinary care for his safety, he could have seen or heard the train, and should have avoided the injury, in consequence. *Ibid.*

15. *Same—Proximate Cause.*—Where injury is inflicted by a railroad company's engineer on a person helpless on the track, which could have been avoided by his exercise of proper care after he had or should have observed his helpless condition, this will not justify an affirmative answer to the issue as to the defendant's negligence unless the negligence was the proximate cause of the injury; nor will the contributory negligence of the plaintiff justify an affirmative answer to that issue unless it was the proximate cause of the injury alleged. *Ibid.*

16. *Railroads—Negligence — Fires — Presumptions — Evidence — Trials—Nonsuit.*—The application of the doctrine that where a railroad company has set out fire, causing damage to another, there is a presumption of negligence on its part, requires that there should be evidence that the railroad company set out the fire; and where the evidence tends only to show that the defendant's depot caught fire during the night, which was communicated to the plaintiff's building and destroyed it, a judgment as of nonsuit upon the evidence is properly allowed. *Kemp v. R. R.*, 731.

17. *Railroads—Negligence—Evidence—Cordwood — Fires.*—Cordwood is a recognized and necessary commodity, with no extra hazards in its transportation or shipment; and a railroad being compelled to receive it when tendered for shipment, under a statutory penalty (Revisal, section 2631), and as it is impracticable to store it in a warehouse, it affords no evidence of negligence in communicating fire to plaintiff's building, when properly piled on the right of way, awaiting cars for shipment, in the absence of evidence that the place at which it was piled was an improper one, and it is not shown that the defendant had originally set out the fire or was responsible for it. *Ibid.*

18. *Railroads—Negligence — Pedestrian — Presumptions.*—An engineer is not required to stop or slacken the speed of his running train upon seeing a pedestrian ahead of him on the track, in the apparent possession of his strength and faculties, and without information to the contrary; for he may act on the assumption that the pedestrian will use his own faculties for his own protection and will leave the track in time to save himself from injury. *Hill v. R. R.*, 740.

19. *Same—Helpless on Track—Duty of Engineer.*—It is the duty of an engineer on a moving train, by reasonable watchfulness, to discover a man in front lying on the track or sitting on the cross-ties, in a helpless condition, or in a position of such evident peril that ordinary efforts on his part if exerted would not likely save him from injury, and when such conditions are or should be observable by the engineer

RAILROADS—*Continued.*

in the exercise of proper care and observation, he should stop the train by every available means short of endangering the lives of his passengers, resolving all doubts in favor of the preservation of human life. *Ibid.*

20. *Same—Trials—Evidence—Nonsuit—Questions for Jury.*—In an action to recover damages of a railroad company for the wrongful killing of the plaintiff's intestate at night, there was evidence tending to show that the intestate was subject to epilepsy, and at times liable to attacks in which he would lose consciousness and fall, one of the fits having occurred the day before he was killed; that the track at the point at which the intestate was killed and for a mile and a half was straight; that the intestate was killed at a place upon the track where one standing upright could have been seen by a witness who was looking down the track at the headlight of the approaching train that killed the deceased, and who could not have seen the deceased had he been lying down on the track at the time, and that this witness saw no one there. *Held*, evidence sufficient to be submitted to the jury upon the question of whether the intestate, at the time he was killed, was in a helpless condition on the track, or whether the defendant's engineer, in the exercise of the care required, should have seen him and stopped the train in time to have avoided the injury. *Ibid.*

RATIFICATION. See Principal and Agent, 1.

RECEIPTS. See Trusts, 10.

RECEIVERS. See Corporations, 5, 7, 9; Bills and Notes, 13; Banks and Banking, 1; Contracts, 3; Trusts, 6, 9.

Corporations — Receivers — Title — Prior Encumbrances — Liens.—The title of a receiver of a private corporation to the corporate property relates back only to the time of his appointment, and it cannot divest the property of valid liens existing at that time. *Roberts v. Mfg. Co.*, 27.

RECORD. See Drainage Districts, 5; Pleadings, 11.

REFERENCE. See Appeal and Error, 6; Mechanics' Liens, 2.

REFERENCE.

Reference—Report—Confirmation by Courts — Pro Forma — Appeal and Error.—Where the referee's findings of fact are supported by evidence and approved by the court, they are not reviewable on appeal; and where it appears that the court refers *seriatim* to the findings of fact and conclusions of law of the referee and adopts them, it is not open to objection that he has done so *pro forma*, for he is not required to state his reasons therefor. *Spruce Co. v. Hayes*, 254.

REFORMATION. See Pleadings, 12; Wills, 14; Appeal and Error, 53; Equity.

REGISTRATION. See Deeds, 16, 19, 20; Corporations, 2, 4; Trusts, 1, 3.

REMAINDERS. See Wills, 1, 2, 3.

REMOVAL OF CAUSES.

Transference of Cause — Omissions in Transcript — Record evidence — Affidavit—Orders—Removal of Causes.—Where a new county is created and causes of action are transferred thereto, and it appears that

REMOVAL OF CAUSES—*Continued.*

one of them was in claim and delivery, whereunder the defendant's property was seized and replevied, but the papers had not been transferred with the other papers, the judge may, without affidavit of the plaintiff, make an order directing an amended or supplemental transcript to be sent, including the claim and delivery papers, when it appeared from the record that they were missing. *Wilkins v. McPhail*, 558.

REPLEVY BOND. See Attachment.

RESCISSION. See Contracts, 1.

RES IPSA LOQUITUR. See Master and Servant, 2.

RESTRAINT OF MARRIAGE. See Deeds, 34.

RESTRAINT OF TRADE. See Contracts, 19, 20.

REVISAL. (See various headings of subjects for greater accuracy.)

CH.

89. Chapter 149, Public Laws of 1913, does not repeal this chapter of Revisal. *School Comrs. v. Board of Education*, 196.

SEC.

366. Absence from the State for a year or more of a party pleading the statute of limitations will not be counted in his favor, though proceedings *in rem* will lie. *Love v. West*, 13.

383. Claimant may acquire a new estate in lands by disseizin and acquiescence. *Moore v. Curtis*, 74.

390. Claimant under tax deed barred in three years and is included under general statute. *Jordan v. Simmons*, 140.

391. The absence of the mortgagor from the State for the statutory period suspends the running of the statute and raises no presumption of payment. *Love v. West*, 13.

395. Sheriff's deed to land without seal is color of title. *Kivett v. Gardner*, 78.

395 (10). Claimant under tax deed barred in three years, and such is included under general statute. *Jordan v. Simmons*, 140.

410. Clerk of court has power to enlarge time to plead in proceedings under Torrens Law, and also to make parties. *Manufacturing Co. v. Spruill*, 618.

440. Evidence that telephone operator collected and accounted to telegraph company in receiving messages for the latter is some evidence of agency. *Brown v. Telegraph Co.*, 509.

512. On appeal from clerk in proceedings under Torrens Law the Superior Court may make new parties and enlarge time to plead. *Sugg v. Greenville*, 606.

515. Variance between allegation and proof held not material. *Brown v. Telegraph Co.*, 509.

535. In action for breach of warranty the suggestion of judge that the condition of horse be tested by driving was not an expression of opinion. *Long v. Byrd*, 658.

539. Court's setting verdict aside in his discretion is in conflict with sustaining a motion to nonsuit on the evidence. *Riley v. Stone*, 421.

REVISAL—*Continued.*

SEC.

591. Case on appeal not in accordance with this section will be dismissed. *Sloan v. Assurance Society*, 257.

641. Advertisement for sale under mortgage should be made once a week for four consecutive weeks, and not consecutively for thirty days. *Banking Co. v. Leach*, 706.

774-5. Bond given to dismiss an attachment is a submission to the court's jurisdiction. *Mitchell v. Lumber Co.*, 397.

962. The presumption of fraudulent intent in conveyances from husband to wife is removed, and it is reversible error to charge the defendant must satisfy the jury by greater weight of evidence. *Shuford v. Cook*, 52.

980. The priority of a deed cannot be affected by a subsequently registered deed in trust formerly resting in parol. *Trust Co. v. Sterchie*, 21.

980. An unrecorded deed will not operate to estop an innocent purchaser of lands. *Sexton v. Elizabeth City*, 385.

988. Copy of State's grant of land is competent without accounting for original; but upon affidavit of variance, court may order original produced, etc. *Lumber Co. v. Lumber Co.*, 80.

1131. Priority of lien for labor performed refers to mortgages given by the corporation. *Roberts v. Manufacturing Co.*, 27.

1168. Pledgee of stock in private corporation does not lose his priority of lien because certificate has not been transferred on books. *Bleakley v. Candler*, 16.

1206. Contractor of a contractor not entitled to lien for labor performed for a corporation. *Iron Co. v. Bridge Co.*, 512.

1206. A corporation acquires property subject to a prior registered mortgage, and it is not subject to the laborer's lien to the extent of the mortgage thereon. *Roberts v. Manufacturing Co.*, 27.

1295. To tax prosecutors with cost of criminal action, they must be given notice and heard. *S. v. Collins*, 323.

1384. Requiring claimants against city to file claims has no application to unliquidated damages and torts. *Sugg v. Greenville*, 606.

1625. When it appears one swearing to statement of goods sold and delivered had no knowledge thereof, it does not raise the presumption. *Nall v. Kelly*, 717.

1625. Itemized account duly sworn to is *prima facie* evidence of amount due. *Carr v. Alexander*, 665.

1631. When affiant to book account for goods sold and delivered to lunatic, etc., is an interested party, affidavit should be disregarded. *Nall v. Kelly*, 717.

1662. Depositions destroyed before opened are not competent, and cannot be testified to. *Lumber Co. v. Lumber Co.*, 80.

1696. An easement in lands covered by navigable waters only acquired under the statutory restrictions. *R. R. v. Way*, 1.

1699. A grant of State's land previously granted is void, and not "color." *Walker v. Parker*, 150.

1707. Requisites of statement to be filed by the enterer with the entry taker of State's lands. *Ibid.*

REVISAL—*Continued.*

SEC.

1708. Entry taker of State's lands must cause copy to be posted, etc. *Walker v. Parker*, 150.

1709. Clerk of court issuing notice to the enterer on State's land to show cause, thus raising issue of fact. *Ibid.*

1893. Land once granted by the State does not thereafter become vacant and unappropriated. *Ibid.*

2017. One contracting to cut and haul logs, after standing timber has been felled, has a lien thereon while in his possession. *Thomas v. Merrill*, 623.

2107. Special probate of wife's deed to husband is constitutional, and noncompliance renders deed void. *Butler v. Butler*, 584.

2239. Indorser may expressly or impliedly waive notice of dishonor. *Bank v. Johnson*, 526.

2259. Indorser may expressly or impliedly waive notice of dishonor. *Ibid.*

2260-1. Indorser may expressly or impliedly waive notice of dishonor. *Ibid.*

2270. Indorser may expressly or impliedly waive notice of dishonor. *Ibid.*

2347-8-50-51-52. A notary public is a public officer. *S. v. Knight*, 333.

2383. Cannot be construed with ch. 967, Laws of 1907, so as not to require license of purchaser of oysters from owner of private beds. *S. v. Sermons*, 285.

2395. This does not apply to one buying oysters from owner of private beds. *Ibid.*

2411. By applying for license when its issuance is forbidden does not justify buyer of oysters in continuing his business. *Ibid.*

2411. This section does not apply to one who buys oysters from owner of private bed. *Ibid.*

2566. Legislature may permit railroad to enter upon right of way before paying assessment to owner. *R. R. v. Ferguson*, 70.

2567 (4). Legislature may permit railroad company to enter upon right of way before paying assessment to owner. *Ibid.*

2587. Legislature may permit railroad company to enter upon right of way before paying assessment to owner. *Ibid.*

2631. Timber received for shipment by railroad and piled on right of way does not, in itself, afford evidence of negligence when it catches afire and communicates it beyond right of way. *Kemp v. R. R.*, 731.

2635. The offices of mail carrier and constable come within the meaning of the Constitution. *Groves v. Barden*, 8.

2768. By statute, the solicitor was given salary in lieu of full fees paid by solvent, and half fees paid by county for insolvents. *Thomas v. Merrill*, 623.

2905. County may purchase land at tax sale without foreclosure. *Kivett v. Gardner*, 78.

2909. Sheriff's deed to land without seal is color of title. *Ibid.*

3142. Where names of several beneficiaries in a clause of a will have been erased, their shares go under the residuary clause. *Barfield v. Carr*, 574.

3254. Indictment need not charge place offense was committed. *S. v. Lancaster*, 284.

3255. Indictment need not charge place offense was committed. *Ibid.*

REVISAL—*Continued.*

SEC.

3276 (3). State may appeal from order quashing indictment. *Ibid.*

3365. A tenant or cropper is not a servant within meaning of this section. *S. v. Etheridge*, 263.

3433. Where proof fails to correspond with offense charged in the indictment, solicitor may send another bill and hold defendant to answer. *S. v. Gibson*, 318.

3576. Willful failure of sheriff to return civil or criminal process is a misdemeanor. *S. v. Berry*, 371.

3592. Willful failure of sheriff to return civil or criminal process is a misdemeanor. *Ibid.*

3604. Willful failure of sheriff to return civil or criminal process is a misdemeanor. *Ibid.*

3640. Where words admit of a slanderous interpretation, but are ambiguous, they become a question for the jury. *S. v. Howard*, 312.

3708. Superintendent of cotton mills is not on his own premises while carrying concealed weapon within meaning of section. *S. v. Bridgers*, 309.

3726. Selling furniture upon the method employed in this case is a lottery. *S. v. Lipkin*, 265.

3784. To establish a public easement over lands there must be a dedication and acceptance by the municipality. *S. v. Haynie*, 277.

4241. The issue being whether application to enter children in white schools were children of Indian blood, it is immaterial whether they had complied with this section. *Goins v. Indian Training School*, 736.

4505a. (Pell's). Does not give monopoly to physicians, etc. Those from whom license required defined. *S. v. Siler*, 314.

4505h. (Pell's). Does not give monopoly to physicians, etc. Those required to take out license defined. *Ibid.*

4505m. (Pell's). Does not give monopoly to physicians, etc. Those required to take out license defined. *Ibid.*

RIGHTS OF WAY. See Railroads, 1, 2.

RIPARIAN OWNER. See Navigable Waters, 2.

ROADS. See Highways.

ROBBERY. See Homicide, 6.

RULE IN SHELLEY'S CASE. See Wills, 2.

RULE OF PRUDENT MAN. See Master and Servant, 9, 12.

RULES OF COURT. See Appeal and Error, 16, 48.

SAFE APPLIANCES. See Master and Servant, 9, 18.

SAFE PLACE TO WORK. See Master and Servant, 5, 6, 8, 24.

SAFETY APPLIANCE ACT. See Railroads, 4.

SALES. See Wills, 14; Costs, 1; Trusts, 17; Taxation, 2; Vendor and Purchaser, 8; Deeds, 24.

SCHOOLS. See Issues.

1. *Schools—Apportionment of School Funds—Private Laws—Apportionment Per Capita—Interpretation of Statutes.*—Chapter 149, Public Laws 1913, is upon its face amendatory of chapter 89 of the Revisal, specifying the sections upon which it acts without reference to section 4029 therein, and as it does not purport to repeal any of the sections of said chapter 89, it is construed to leave the provisions of section 4029 in force, to the effect that the provisions of chapter 89, Revisal, shall not apply to any township, city, or town now levying a special tax for schools and operating under special laws or charter. Hence chapter 324, sec. 207, Private Laws 1907, providing for the apportionment from the public school funds of Mecklenburg County per capita for the public graded schools of the city of Charlotte, and as brought forward and explained by the Laws of 1915, is not repealed by said chapter 149, Public Laws 1913, requiring the apportionment "so as to give to each school in the county for each race the same length of school term, as nearly as may be, each year." *School Commissioners v. Board of Education*, 196.

2. *Same—Constitutional Law.*—Revisal, sec. 4029, providing that chapter 89 of the Revisal shall not apply to townships, cities, or towns now levying a special tax for schools under special laws or charters, and chapter 324, sec. 207, Private Laws 1907, providing the apportionment from the county school funds to the city of Charlotte shall be per capita, do not contravene Article IX, sec. 2, of the State Constitution, providing for "a general uniform system of public schools," etc. *Ibid.*

3. *School Districts—Counties—State Agencies.*—Counties are mere agencies of the State, and the Legislature has authority to create school districts solely in one or partly in two counties and abolish them at will. *Marsh v. Early*, 465.

4. *Same—Enlarging and Reducing Districts—Taxation—Constitutional Law.*—Where under legislative enactment a school district has been enlarged upon approval of its voters, a bond issue for school purposes favorably passed upon and taxes levied therefor and the collection thereof placed in the hands of a duly authorized collector, the collector may not be enjoined by the taxpayers living in the territory taken in, on the ground that the Legislature, by a subsequent act, has again restricted the district to its former limits, the taxes sought to be enjoined being those due before the latter enactment became effective. *Ibid.*

5. *Same—Back Taxes—Interpretation of Statutes.*—Ch. 485, Private Laws 1913, extending the limits of Aulander School District to take in certain outlying territory, provided the proposition be favorably voted upon by the voters of the proposed district, and chapter 424 of the same laws, making the school district coterminous with the boundaries of the town, may stand together in their interpretation. *Ibid.*

6. *Schools—Indians—Interpretation of Statutes.*—Laws of 1885, chapter 51, providing for separate schools for Croatan Indians of Robeson County, claiming to be descendants of a friendly tribe once residing in Eastern North Carolina, and chapter 400, Laws of 1887, striking out the words "Croatan Indians" wherever they appear and inserting in lieu thereof the words "Indians of Robeson County," and the last named act amended by chapter 223, Laws 1913, striking out the

SCHOOLS—*Continued.*

words "Indians of Robeson County" and inserting in lieu thereof the words "Cherokee Indians of Robeson County," do not restrict the pupils of the school to the children of the Croatan race who resided in that county in 1885, but include within their meaning those who have become residents within the limits of the school district in good faith from other or adjacent or neighboring territory. *Goins v. Indian Training School*, 736.

SEALS. See Contracts, 10; Taxation, 1.

SELF-DEFENSE. See Homicide, 4.

SETTLEMENT. See Railroads, 7.

SHERIFFS.

1. *Criminal Law — Indictment — Sheriff's Return of Civil Process.*—The willful failure of a sheriff to return process directed to him from the Superior Court is made a misdemeanor by the provision of Revisal, sec. 3604, and applies to civil as well as criminal process, its placing under the title of "crimes and punishments" being irrelevant in construing the language employed; and this interpretation is also applicable under Revisal, secs. 3576, 3592. *S. v. R. R.*, 145 N. C., 498, cited and distinguished. *S. v. Berry*, 371.

2. *Same—Corrupt Intent.*—It is unnecessary for an indictment against a sheriff for willful failure to return legal process directed to him to allege a corrupt intent. *Ibid.*

SHIPMENT. See Vendor and Purchaser, 3.

SOLICITORS. See Statutes, 8.

SPECIAL REQUESTS. See Evidence, 6.

STATE REGULATIONS. See Intoxicating Liquors, 3.

STATE'S LAND. See Navigable Waters, 1, 3; Public Lands, 1, 5, 7, 8, 9, 11, 12, 13.

STATUTE OF FRAUDS. See Contracts, 6, 15.

STATUTE OF LIMITATIONS. See Limitation of Actions, 1; Lotteries, 1, 4; Master and Servant, 19; Navigable Waters, 3; Officers, 1, 2; Public Lands, 7, 8, 9.

STATUTES. See Railroads, 2, 4; Taxation, 2, 3; Trusts, 4, 6; Appeal and Error, 22, 24; Courts, 8, 9, 12; Criminal Law, 12; Schools, 5; Deeds, 8, 20; Comerce, 7; Easements, 2, 4; Fish and Oysters, 2, 4; Indictment, 2; Elections, 1; Commerce, 1, 2, 3, 4, 5; Judgments, 10; Master and Servant, 21; Attachment, 1; Contracts, 19; Drainage Districts, 1, 3, 5, 7; Health, 1; Highways, 3; Husband and Wife, 1, 2, 3; Logs and Logging, 1; Schools, 6; Vendor and Purchaser, 11; Municipal Corporations, 7; Torrens Law, 1; Trials, 16; Wills, 10; Carriers of Goods, 1; Pleadings, 8; Telegraphs, 11; Liens, 1; Intoxicating Liquors, 5.

1. *Statutes, Interpretation of—Ambiguity—Language Used—Legislative Intent—Public Policy—Power of Courts.*—A statute should be construed with reference to the whole or related subjects of other statutes of which it is a part, and when ambiguously expressed, the courts, in proper instances, may consider injurious consequences as

STATUTES—*Continued.*

affecting the public in its business; but where the statutes are consistently, plainly, and clearly expressed, no need for construction arises, it being within the province of the Legislature to declare the public policy of the State, and of the courts to construe the statute so as to give effect to the legislative intent as gathered from the language used. *Roberts v. Mfg. Co.*, 27.

2. *Statutes—Declaratory—Interpretation — Vested Rights — Retroactive Laws.*—Statutes which deprive citizens of their rights under former laws should not be construed to be retroactive unless the legislative intention to that effect clearly appears therefrom. *State v. Haynie*, 277.

3. *Statutes—Constitutional Law—Criminal Law—Appeal and Error.*—Where a statute unlawfully declares a private cartway over the lands of the owner a public way, and makes an obstruction thereof by the owner punishable under the criminal law, a conviction thereof by the owner in the Superior Court will be set aside on appeal. *Ibid.*

4. *Water and Water Courses—Water Powers—Interurban Railways—Easements—Condemnation—Interpretation of Statutes.*—Chapter 74, Laws 1907, amended by chapter 302, Laws 1907, authorizes street and interurban railway companies, under certain conditions, to acquire by condemnation, in the manner provided for railway companies, water rights or other easements which are necessary to fully develop their water power on unnavigable streams flowing by their lands, etc., which is further amended by chapter 94, Laws 1913, with proviso that this right shall not extend to any water power, right or property of any person, firm or corporation engaged in the actual service of the general public, where such power, right or property is being used or held to be used or developed for use, or in connection with or in addition to any power actually used by such person, firm or corporation serving the general public. *Held*, a public-service corporation, chartered by name of interurban railway, owning lands on one bank of an unnavigable stream, cannot condemn across the stream and take the water rights held in the stream by another such and adjoining public-service corporation, when it appears that the defendant holds its lands across the stream for the further use of supplying power to operate its electric light and power plant, with which it is supplying such light and power to its patrons; and where there is evidence tending to show the existence of such facts, the question is a mixed one of fact and law for the determination of the jury; and the refusal of the trial judge to submit appropriate issues thereon is reversible error. *R. R. v. Oates*, 164 N. C., 172, cited and approved. *R. R. v. Light and Power Co.*, 471.

5. *Statutes—Interpretation—Intent.*—When construing a statute the words used therein will be given their ordinary meaning, unless it appears from the context that they should be taken in a different sense; and where the statute is plainly and unambiguously expressed, conveying a single, definite, and sensible meaning, where no construction is allowable, its intendment must be ascertained from the language used, and a literal meaning given it. *Abernethy v. Comrs.*, 631.

6. *Same—Words Omitted.*—When it is necessary to carry out the clear meaning of a statute, and to make it sensible and effective, the court may interpolate the words necessary thereto, which were evidently

STATUTES—*Continued.*

omitted, as appears from the context, or silently understand them to be incorporated in it. *Fortune v. Commissioners*, 140 N. C., 322. *Ibid.*

7. *Statutes—Interpretation—In Pari Materia.*—To ascertain the mischief which an act of the Legislature was intended to remove, it is permissible, in the interpretation thereof, to consider other statutes, related to the particular subject, or to the one under construction. *Ibid.*

8. *Same—Solicitor's Salaries—Fees.*—A legislative enactment created a recorder's court in a certain county, giving it extensive jurisdiction of criminal offenses committed therein, and also enacted a law directing the county commissioners to pay the solicitor of the district six hundred dollars annually "in lieu of fees now provided by law." *Held*, construing these two statutes together, that the Legislature intended to compensate the solicitor for the fees he would be deprived of by the establishment of the recorder's court, by paying him a sum certain as a salary in lieu of all fees, whether full fees paid by solvents or half fees paid by the county for insolvents (Revisal, section 2768), upon convictions had. *Ibid.*

9. *Same—Implication.*—Interpreting an act directing the county commissioners to pay the solicitor in that district six hundred dollars "in lieu of fees now provided by law, which the said solicitor would receive from the said county . . . on account of convictions in the criminal courts of the county by said solicitor": *Held*, the intent of the Legislature unmistakably being that the stated salary was to be in lieu of all fees, including the half fees paid by the county for insolvents, it is necessarily implied that all the fees shall be turned into the county treasury to increase its general fund, the fees that he would otherwise have received having been commuted in this way, and the county receiving the fees in return for the salary paid. *Ibid.*

10. *Statutes—Interpretation—Intent—Affidavits of Legislators.*—The intent of the Legislature is expressed in the statute, and must be ascertained from its words; therefore, affidavits of Senators and Representatives in the Legislature as to its meaning will not be considered for the purpose of construing it, where construction is necessary. *Ibid.*

11. *Statutes—Interpretation—Affidavits—Intent and Meaning.*—In interpreting a statute it is not permissible to show its intent and meaning by affidavit of legislators, for such must be gathered from the act itself. *Goins v. Indian Training School*, 736.

STEAMBOATS. See Deeds, 33.

STREET RAILWAYS. See Electricity, 1.

STREETS. See Deeds, 18, 19, 39, 40; Pleadings, 9; Municipal Corporations, 1.

SUBSCRIPTIONS. See Contracts, 5, 6; Trusts, 6, 9.

SUFFRAGE. See Constitutional Law, 3, 8.

SUMMONS. See Process.

SURVEY. See Deeds, 6; Public Lands, 1, 6.

SWITCHING CARS. See Commerce, 6; Railroads, 4.

TAXATION. See Schools, 4, 5.

1. *Taxation—Tax Deeds—Seals—"Color"—Irregular Deeds—Limitation of Actions.*—Sheriff's deed made to lands bought in by the county at a sale for taxes purporting to convey the lands is color of title for the purchaser from the county, though lacking a seal, and the purchaser's sufficient possession thereunder will ripen into an indefeasible title. *Semble,* the purchaser's possession for three years under an irregular sheriff's deed would be sufficient. Revisal, secs. 2909, 395. *Kivett v. Gardner,* 78.

2. *Taxation—Tax Deeds—Sales—Purchased by County—Foreclosure—Interpretation of Statutes.*—A county may become the purchaser of lands at its sale for taxes without resorting to foreclosure. Revisal, sec. 2905. *Ibid.*

3. *Taxation—Tax Deeds—Limitation of Actions—Interpretation of Statutes.*—The three-year statute of limitations bars the right of action in favor of a claimant under a tax deed (Pell's Revisal, sec. 2909), and the general statute, Revisal, secs. 390-395 (10), is broad enough to include actions for and against such claimant, and bars the right of action after the time stated in the general statutes from the execution of the tax deed. *Jordan v. Simmons,* 140.

4. *Taxation—Pleadings—Tax Deeds—Limitation of Actions.*—The three-year statute of limitations in favor of or against the claimant under a tax deed to lands must be properly pleaded to be made available. *Ibid.*

5. *Taxation—Tax Deeds—Limitation of Actions—Possession.—Semble,* the three-year statute of limitations may not be successfully pleaded by the claimant under the tax deed against the original owner in possession of the lands. *Ibid.*

6. *Taxation—Tax Deeds—Purchaser—Husband and Wife.*—A wife may become the purchaser of her husband's land under a sheriff's sale for taxes, paying for the same out of her separate funds, and acquire the title as a third person may do. *Ibid.*

7. *Taxation—Counties—Dog Tax—Licenses—Police Regulation—Constitutional Law.*—A statute imposing a specified tax upon all persons owning or keeping a dog within a certain county is for the privilege of keeping the dog therein, and comes under the police regulations of the county. It is therefore constitutional and valid, and will not be restrained. *Newell v. Green,* 462.

8. *Same—Uniformity.*—The constitutionality of a legislative enactment uniformly imposing a tax upon persons owning or keeping dogs within a certain county is not affected by the fact that the act does not apply to all counties of the State. *Ibid.*

9. *Taxation—Distribution of Proceeds—Legislative Discretion—Constitutional Law.*—The distribution of the proceeds derived from the imposition of a tax is a matter within the discretion and judgment of the Legislature, and will not affect the constitutionality of the act. *Ibid.*

TAX DEEDS. See Taxation; Deeds, 35.

TAX VALUES. See Appeal and Error, 1.

TELEGRAPHS.

1. *Telegraphs — Valid Stipulation — Contracts — Written Demand — Suit Brought—Reasonable Compliance.*—The stipulation on the back of a telegram requiring that a written demand within sixty days be made on the company for damages claimed for its negligent transmission or delivery is reasonable and valid and subject to reasonable enforcement; and where action has been begun within the time stated, it is equivalent to the required notice. *Mason v. Telegraph Co.*, 229.

2. *Same—Two Messages—Demand as to One.*—Where suit has been brought against a telegraph company for damages for negligence in handling two telegrams upon the same subject-matter, within the sixty days stipulated upon the message blank, sent within five days of each other, and complaint filed at the proper term of court, it is held that the terms of the stipulation have been reasonably complied with, and this is not affected by the fact that within the sixty days the plaintiff had made demand only upon the second message; and where recovery is had only upon the first one, the defendant cannot reasonably object upon the ground that it had been misled. *Ibid.*

3. *Telegraphs—Delivery to Company—Principal and Agent—Evidence.*—In order to hold a telegraph company liable in damages for the non-delivery of a telegram, it is necessary to show that it was received for the company by some one of its agents having express or implied authority to do so, which does not appear in this case, the evidence tending only to show that the one to whom the message was delivered, from a train en route passing a station, was known to the person delivering it to have had some connection with a railroad company or the defendant telegraph company at some other location and time, and had been in the defendant's office, and that he receipted and received the money for the transmission of the message, saying it would immediately be sent. *House v. Telegraph Co.*, 242.

4. *Telegraph — Transmission — Terminal Office — Usual Method — Negligence.*—When a telegram received for transmission and delivery is sent by the company to one of its offices, not the usual one for delivery at a certain place near by, and the delivery attempted there by phone, the measure of the company's duty to make a prompt and safe delivery is increased, and where there is evidence that by reasonable effort to deliver at its proper office the delivery would have been made in time to have avoided the injury complained of in the action, the question of defendant's negligence should be submitted to the jury. *Medlin v. Tel. Co.*, 495.

5. *Same—Evidence—Trials—Questions for Jury.*—In an action to recover damages for mental anguish from a telegraph company for its alleged negligent failure to deliver a telegram accepted by it for transmission and delivery, and addressed in the care of Rosemary Mills, there was evidence tending to show that it had a regular office where it customarily delivered messages at the address given, both by phone and messenger service; that addressee was well known and within the free delivery limits of this office, but that the defendant transmitted the message, contrary to its usage, to another town some short distance away; that its agent there attempted to deliver the message by phone, but made slight inquiry there to find the addressee, and then telephoned the message to another mill in the vicinity, to one of the same surname but of different given name; being sub-

TELEGRAPHS—*Continued.*

sequently informed that the addressee was not located at this mill, that she was at another mill in the vicinity, to which the message had been originally addressed, and could be communicated with, replied thereto that the message had been already delivered; and it further appearing that the sender's address had been left at the receiving point, who thereafter, upon inquiry, was informed by the company's agent that the message had probably been delivered, for, if not, a service message would have been received: *Held*, sufficient evidence to be submitted to the jury upon the question of defendant's actionable negligence in failing to deliver the message, especially as afterwards the company was informed, at the place of destination, that sendee was there and would be brought to the telephone to receive the message, and this offer was ignored. *Ibid.*

6. *Telegraphs—Efforts to Deliver—Evidence—Negligence.*—Where a telegraph company has accepted for transmission and delivery, over its own and a telephone line, a telegram addressed care of Rosemary Mills, it is its duty to make reasonable effort to deliver the message by phone or messenger at the place specified when within its free delivery limits, if such service was required for its delivery; and under the circumstances of this case, it is held that its failure to have done so is evidence sufficient to take the case to the jury upon the question of its actionable negligence. *Ibid.*

7. *Telegraphs—Contributory Negligence—Inaccurate Address.*—Where it appears that a telegraph company, by the exercise of the care required of it, could have delivered the message, the subject of the suit, though inadequately addressed, contributory negligence in not giving a more definite or accurate address cannot successfully be interposed as a defense, especially where no inquiry was made of the sender for a better address. *Ibid.*

8. *Telegraphs — Messages Collect — Acceptance of Message — Evidence—Nondelivery—Prima Facie Case—Burden of Proof.*—Where a telegraph company accepts a message for transmission and delivery where the tolls have been paid or without demanding their payment on delivery thereof, and there is evidence that the message had not been delivered, a *prima facie* case of negligence is made out in plaintiff's favor, calling upon the defendant to show matters in excuse. *Ibid.*

9. *Telegraphs—Negligence—Instructions—Proximate Cause.*—In an action to recover damages for mental anguish for the alleged negligent delay of a telegraph company in delivering a message, thereby preventing the plaintiff from attending the funeral of her mother, an instruction by the court that the plaintiff must show the negligent failure of the defendant in not delivering the message; that this must have prevented plaintiff from attending the funeral, and thereby have caused the mental anguish, is sufficient upon the question of proximate cause. *Ibid.*

10. *Telegraphs — Principal and Agent — Telephones — Local Operator.*—Where the local operator of a telephone company at a point where a telegraph company has no office, is also the agent of the latter company to receive messages there and telephone them to a near-by town, to the office of the telegraph company for transmission and delivery, the receipt by the local operator of such messages is a receipt thereof by the telegraph company, making it liable for the action-

TELEGRAPHS—*Continued.*

able negligence of the local operator in not promptly telephoning them. *Brown v. Tel. Co.*, 509.

11. *Same—Trials—Evidence—Statutes.*—Where there is evidence tending to show that the local agent of a telephone company customarily received messages from its subscribers, to be telephoned to the office of a telegraph company at a near-by town for transmission and delivery over the latter's system, made out tickets therefor against the telegraph company and collected for the telegrams at the end of the month and remitted the money to the telegraph company, it is held sufficient to be submitted to the jury upon the question of whether the agent of the telephone company was also the agent of the telegraph company. Revisal, sec. 440(1). *Ibid.*

12. *Same—Telegrams—Delay in Delivery—Torts.*—In an action to recover damages of a telegraph company for the alleged negligent delay in the delivery of a telegram, whereby the plaintiff, the addressee of the message, was prevented from attending the funeral of her sister-in-law, there was evidence in the defendant's behalf tending to show that the plaintiff could have taken a later train or have hired an automobile at the cost of $10 and have reached her destination in time to have avoided the injury; and in plaintiff's behalf, that she could not have made the necessary preparations in time to have taken that train, or have obtained the money from her husband necessary for her to have done so; and that she could not have afforded to have hired an automobile. *Held*, the question was properly submitted to the jury as to whether the defendant's negligence was the proximate cause of the injury, and whether the plaintiff had done what she reasonably could to have avoided the injury or minimize her damages. *Weeks v. Tel. Co.*, 702.

13. *Telegraphs—Relationship—Affection—Evidence—Declarations.*—In an action to recover damages for mental anguish caused by the failure of the defendant telegraph company to promptly deliver a death message to the plaintiff, the sister-in-law of the deceased, evidence of the state of feelings having existed between the plaintiff and deceased are directly relevant to the issue; and both the conduct of the parties towards each other and their conversations and declarations about the other are usually admissible, the limitation being that they should have been at a time and under circumstances to exclude any reasonable suspicion of their sincerity. *Ibid.*

14. *Same—Corroboration.*—Where the plaintiff sues a telegraph company for damages for mental anguish for its alleged negligent delay in delivering a telegram announcing the death of a sister-in-law, and evidence has been introduced which tends to show the close regard and affectionate feeling that had existed between them, testimony of the husband of the deceased as to this state of feeling, and that his wife desired his sister to have their little boy in case she died, was competent, either as direct evidence or in corroboration of the evidence of affection having existed between the deceased and her sister-in-law. *Ibid.*

TELEPHONES. See Telegraphs, 10.

TENANT. See Master and Servant, 19.

TENANTS IN COMMON. See Pleadings, 3.

Actions—Tenants in Common—Title Denied—Recovery.—A tenant in common may recover his interest in the lands held in common, on denial of his ownership, and, as against a trespasser who is a stranger to the common title, he may in proper instances be allowed to recover the entire property. *Taylor v. Meadows*, 124.

TENDER. See Deeds, 47.

TIMBER. See Contracts, 16; Deeds, 1, 46, 47.

TITLE. See Trespass, 1; Courts, 12, 13; Deeds, 22, 23, 25.

TORRENS LAW. See Appeal and Error, 46.

1. *Torrens Law—Parties—Pleadings—Clerk of Court—Interpretation of Statutes.*—The clerk of the Superior Court, under the general provisions of Revisal, section 410, has the authority to permit persons claiming an interest in the land to be made a party defendant, and enlarge the time to answer, in proceedings to register a title under the provisions of chapter 90, Laws of 1913, known as the "Torrens Law." *Mfg. Co. v. Spruill*, 618.

2. *Same—Superior Court Judge.*—Under the provisions of chapter 90, Laws of 1913, known as the "Torrens Law," the judge of the Superior Court is given authority over the whole proceedings before the clerk, and to require reformation of the process, pleadings or decrees or entries, and therefore he has authority to allow parties defendant to be made and enlarge the time within which to file answers. Revisal, section 512. *Ibid.*

TORTS. See Municipal Corporations, 7; Corporations, 10; Telegraphs, 12.

Negligence—Tort Feasors—Joinder—Parties—Demurrer.—The wrongful acts of two or more persons concurring in producing a single injury, with or without concert between them, may constitute joint tort feasors of the persons so acting, and they, as a rule, may be sued jointly or together, at the election of the plaintiff; and wherein the plaintiff, by proper allegation, has pursued the latter course, and a cause of action is stated against either of the defendants, a joint demurrer filed to the complaint is bad. *Hipp v. Farrell*, 551.

TRANSFERENCE OF CAUSE. See Judgments, 17; Removal of Causes.

TRANSCRIPT. See Removal of Causes, 1.

TRESPASS.

1. *Trespass—Title—Burden of Proof.*—The weakness of the defendant's title to land will not avail the plaintiff in an action of trespass involving title, for he must recover, if at all, upon the strength of his own title. *Elliott v. R. R.*, 394.

2. *Same—State Grants—Deeds and Conveyances—Color—Plaintiff's Evidence.*—Where the plaintiff's own evidence, in an action of trespass on lands involving title, tends to show sufficient adverse possession of the defendant under color to take the title out of the State and ripen it in defendant, or in one under whom he claims, and the plaintiff is claiming the *locus in quo* by grant from the State, issued after the title had ripened, he cannot recover. *Ibid.*

TRESPASSER. See Railroads, 10, 12, 14.

TRIAL BY JURY. See Injunctions, 1.

TRIALS. See Wills, 7, 8; Vendor and Purchaser, 14; Carriers of Goods, 1, 4; Equity, 3; Judgments, 22; Railroads, 16, 20; Larceny, 1; Commerce, 8; Master and Servant, 1, 2, 3, 4, 7, 10, 13, 21, 22, 27; Negligence, 3; Deeds, 26, 29, 38, 41; Appeal and Error, 1, 11, 14, 15, 27; Electricity, 1; Evidence, 1; Homicide, 2; Municipal Corporations, 2; Contracts, 14; Carriers of Passengers, 5; Pleadings, 7; Telegraphs, 5, 11; Insurance, Life, 3; Limitation of Actions, 3.

1. *Electricity—Trials—Evidence—Nonsuit—Questions for Jury.*—Under the rule that the evidence should be considered in the light most favorable to the plaintiff on a motion to nonsuit, the motion should be denied upon evidence tending to show that the plaintiff was employed by the defendant to keep the machinery of its mill in operation, which was run by an electric motor, belts, shafting, etc., under the management and control of the defendant upon the inside of its mill; that the plaintiff was not an electrician and totally ignorant of the operation of the motor; that while replacing a belt, which had fallen from its pulley, according to a method customary and known to the defendant and which he had followed several years without injury, he was severely shocked and injured by catching hold of an iron pipe, which injury would not have resulted if a ground wire without his knowledge had not been removed from the motor. *Cochran v. Mills Co.*, 57.

2. *Evidence—Rejected Instructions.*—It was incompetent, in this case, to show that the court refused certain instructions in another suit, the same being *res inter alios acta*. *Lumber Co. v. Lumber Co.*, 80.

3. *Trials—Improper Arguments—Error Corrected—Appeal and Error—Harmless Error.*—Improper arguments by counsel to the jury will not be regarded as reversible error when it appears that upon objection the trial judge stopped the argument and withdrew the matter from the consideration of the jury in unmistakable terms. *Hallman v. R. R.*, 127.

4. *Trials—Witnesses—Explanations—Incompetent Evidence—Procedure.*—Questions on cross-examination of a witness for the purpose of testing the value of his testimony may be proper when incompetent on direct examination, and it is permissible for the witness to give his reason when confined within proper limits; and an improper reason will not necessarily render the opinion of the witness incompetent, for there may be other valid reasons, and where the reason is deemed to be incompetent, the objecting party should expressly object to it or ask that it be stricken out. *R. R. v. Manufacturing Co.*, 156.

5. *Instructions—Trials.*—The failure of the trial judge to give requested instructions is not erroneous when he gives them substantially in his own language in his general charge. *Lynch v. Veneer Co.*, 169.

6. *Instructions, Improper—Issues—Trials.*—Prayers for instruction not addressed to the particular issue are defective, and a refusal to give them cannot be assigned for error. *Ibid.*

7. *Instructions—Contributory Negligence—Directing Verdict—Trials.*—In this action to recover for a personal injury and under the evidence introduced, a prayer for instruction to find for defendant upon the issue of contributory negligence, if they find the facts to be as testified, was properly refused. *Ibid.*

TRIALS—*Continued.*

8. *Trials—Evidence—Hearsay—Dangerous Appliances—Inhibited Use.*—Where plaintiff's intestate has been killed while being carried to the surface of the ground after working in defendant's mine as an employee, it is incompetent as hearsay for the defendant to show by another employee, a witness, what he had been told with regard to not using the device, when such is not for the purpose of impeachment. *Hardister v. Richardson*, 186.

9. *Instructions—Trials—Negligence—Wrongful Death—Measure of Damages.*—The instruction of the court to the jury upon the measure of damages recoverable for the wrongful death of the plaintiff's intestate is approved under *Ward v. R. R.*, 161 N. C., 186, and that line of cases. *Massey v. R. R.*, 245.

10. *Railroads—Trials—Instructions—Appeal and Error—Harmless Error.*—In this action to recover of a railroad company damages for the negligent killing of the plaintiff's intestate, an employee, the verdict was in plaintiff's favor, and exception to the charge is taken upon the small amount of the damages awarded, contended to have resulted by the jury's diminishing the amount in considering the question of contributory negligence. Construing the charge as a whole, it appears that only the defendant's negligence was considered, and no reversible error is found. *Montgomery v. R. R.*, 249.

11. *Trials—Evidence—Impeachment.*—*Held*, in this case, testimony of a certain witness was admissible for the purposes of impeachment. *Shepherd v. Taylor*, 258.

12. *Trials—Evidence—Nonsuit.*—The refusal to nonsuit upon the evidence in this case was proper. *S. v. Poteet*, 30 N. C., 23; *S. v. Eliason*, 91 N. C., 564. *State v. Tate*, 373.

13. *Burglary—Identification—Evidence—Questions for Jury—Trials.*—Whether the evidence is sufficient to be submitted to the jury and to sustain their verdict is a question of law; and in this case it is held sufficient, though there are several circumstances, consistent with the prisoner's innocence, to identify him as the one charged with, tried for, and convicted of burglary in the first degree. *State v. Allison*, 375.

14. *Trials—Evidence—Books—Admissions.*—Upon giving direct testimony of the indebtedness of the defendant, the amount being in controversy, it is competent for the plaintiff to introduce the ledger in corroboration and further testify that the defendant had seen the statement thereon and admitted it to be correct. *Wilkins v. McPhail*, 558.

15. *Trials—Instructions—Wills—Mental Capacity—Prayers for Instruction.*—There is no special formula required for instructing the jury as to the mental capacity required for the valid execution of a deed or will, and a special instruction requested thereon, though correctly stating the law, will not confine the judge to the language therein used, for it is sufficient if the trial judge substantially gives it in his own words, he not being bound by the language of counsel. *In re Craven*, 561.

16. *Trials—Expression of Opinion—Vendor and Purchaser—Contracts—Breach of Warranty—Courts—Interpretation of Statutes.*—In an action upon a check given for the purchase of a horse, the payment of which was in controversy, and defended upon the ground of a

TRIALS—*Continued.*

breach of warranty of the horse, a suggestion made by the trial judge, that a good way to test the truth of the matter would be for each party to select a man and drive the horse sufficiently to see what his condition was, is not an expression of opinion to the defendant's prejudice, as to whether the fact at issue was proven, and does not constitute error under the provisions of the Revisal, sec. 535. *Long v. Byrd*, 658.

17. *Trials—Issues—Forms.*—Where the issue submitted by the court clearly presents the issuable facts in an action, the form thereof is immaterial. *Carr v. Alexander*, 665.

18. *Instructions—Trials—Charge as a Whole—Harmless Error—Appeal and Error.*—The error complained of in the charge in this case is untenable, being taken to statements by the court of the contention of the parties, which arose from the evidence, and to single expressions taken from a paragraph, the charge, construed as a whole, being correct; and this applies to a statement of the court, relating to the contention of the parties, that compensation cannot be awarded for physical pain and mental suffering, which taken alone would be error. *Lupton v. Express Co.*, 671.

TRUST AND PROFIT. See Constitutional Law, 8.

TRUSTS. See Bills and Notes, 10, 11, 13; Courts, 3; Deeds, 15; Equity, 3.

1. *Trusts and Trustees—Deeds and Conveyances—Parol Trusts—Judgments—Liens—Registration—Notice—Consideration.*—A parol trust in lands in favor of a grantor of a deed purporting to convey the fee cannot be established, the effect being to contradict the writing by parol; and where a judgment has been obtained and docketed against the grantee, the lien thereof immediately attached upon the registration of his deed, and cannot be defeated by a deed in trust subsequently registered and carrying out the agreement theretofore resting only in parol; and the consideration recited in grantee's deed is immaterial. Revisal, sec. 980. *Trust Co. v. Sterchie*, 21.

2. *Trusts and Trustees—Parol Trusts—Long Delays—Evidence—Burden of Proof.*—Where a parol trust is sought to be engrafted upon the legal title to lands, that the grantee should reconvey the lands if the profits in operating a gold mine thereon for a reasonable length of time would repay a debt owed by the plaintiff to him, the plaintiff fails to show that the profits would be sufficient within such time where the evidence, as in this case, is too indefinite and uncertain to be submitted to the jury. *Coxe v. Carson*, 132.

3. *Trusts and Trustees—Parol Trusts—Repudiation of Trusts—Deeds and Conveyances — Registration — Limitation of Actions.*— Where the holder of the legal title to lands conveys the same by deed of trust to another as trustee, with power of sale, and the deed is registered and the *cestui que trust* enters into the possession and use of the lands, the act of such holder is a repudiation of any parol trust which may be sought to be engrafted upon his title, and the statute of limitations commenced to run from the time the alleged trustee had placed himself in this hostile attitude towards the beneficiaries of the parol trust. *Ibid.*

4. *Trusts and Trustees—Married Women—Interpretation of Statutes—Limitation of Actions.*—Chapter 78, Laws 1899, brings a married woman within the operation of the statute of limitations, and she

TRUSTS—*Continued.*

may be barred thereby from asserting her rights as a beneficiary under a parol trust in lands. *Ibid.*

5. *Trusts and Trustees—Parol Trusts—Laches—Presumptions—Equity—Evidence.*—Where a party to a suit to establish a parol trust in lands has delayed for an apparently unreasonable period of time to assert his rights after knowledge of a repudiation thereof by the holder of the legal title, it is necessary for him to clearly establish the trust relation, and in order for him to have a reasonable and legal excuse for the delay he must show a fraudulent concealment of the facts from him materially relating to his rights, due diligence on his part, etc.; and equity will not interfere in his behalf, or rebut the presumption that the trusts have been satisfied, in the absence of his explanation for the delay, especially when the adverse party is deprived thereby, as, for example, by the loss of important evidence, of ascertaining the nature of the original transaction, or of evidence to disprove the existence of the trust relation sought to be established. *Ibid.*

6. *Trusts and Trustees—Voluntary Subscriptions—Equity—Receivers.*—Voluntary subscriptions to build a roadway between two named points under a specified management are properly regarded as trust funds available to creditors who have made advances and supplies to the management, considered as trustees, engaged in the prosecution of the enterprise; and where it is made to appear that it is necessary to the preservation of the fund, or to a due and proper execution of the trust, a court of equity will appoint a receiver. *Rousseau v. Call*, 173.

7. *Trusts and Trustees—Personalty—Parol—Requisites.*—A trust in personalty may be created by parol without the use of any particular form, and it will be recognized and enforced whenever it is manifest that a trust is intended, and the subject-matter, the purpose, *i. e.*, the disposition of the property, and the beneficiaries are designated with a reasonable degree of certainty; and while a transfer of property is usually involved, it is not an essential requirement, and a trust of this character may be and not infrequently is created when one directs that a specific debt due him or a part of it be retained or paid over by the debtor in trust for another, or gives his note for a like purpose. *Ibid.*

8. *Trusts and Trustees—Executory Trusts—Consideration.*—A valid consideration must be shown to sustain a trust of an executory nature. *Ibid.*

9. *Trusts and Trustees—Voluntary Subscriptions—Receivers—Delinquent Subscribers—Right of Action.*—Where a receiver has been duly appointed to carry out the terms of a trust created by subscriptions to build a road, he, as such, represents the rights of the management, trustee, and creditors, and the *cestui que trust* having made demand required by the terms of the subscription, is entitled to recover from delinquent subscribers any balance they may be due on their subscriptions. *Ibid.*

10. *Trusts and Trustees—Trust Funds—Lands—Proceeds—Payment—Receipt—Voucher.* Where lands have been sold and the purchase price is held by trustees in lieu thereof, subject to the final decree of the court, and accordingly the right of the person entitled has been

TRUSTS—*Continued.*

adjudicated, his receipt held by the trustee is a sufficient voucher for the disbursement of the trust estate. *Hobgood v. Hobgood*, 485.

11. *Trusts and Trustees—Estates—Title in Controversy—Duty of Trustee.*—It is the duty of the trustee to defend and protect the title to the trust estate when in controversy and to defend the action in good faith. *Belcher v. Cobb*, 689.

12. *Same—Courts.*—Where an estate is held in trust for infant *cestuis que trustent*, and their rights thereunder are in controversy, it is for the courts, and not for the trustee, to pass upon them. *Ibid.*

13. *Trusts and Trustees—Consent Judgment—Surrender of Rights.*—Where a trustee has successfully established the trust estate in an action calling its validity in question, by the judgment of the court, he may not thereafter consent to a judgment to be entered declaring invalid the instrument creating the trust, and thus destroy the rights of the *cestuis que trustent* thereunder. *Ibid.*

14. *Same—Pleas in Bar—Estoppel.*—A consent judgment rests upon an agreement of the parties to the action, and is not the judgment or decree of the court. Hence, a judgment alone consented to by a trustee in excess of his authority and in surrender of the rights of the *cestuis que trustent* under a judgment theretofore obtained will not operate in bar of their rights, for as to them the judgment is null and void. *Ibid.*

15. *Trusts and Trustees—Consent Judgment—Relinquishing Rights—Consideration.*—Where the *cestuis que trustent* are seized of a vested remainder in fee under the deed of trust, and in an action involving the validity of the deed the trustee has successfully defended to judgment and then consents to a judgment relinquishing the rights of the *cestuis que trustent* thereunder, the legal effect of the consent judgment is that of a conveyance of the trust estate without consideration, and is null and void. *Ibid.*

16. *Mortgages—Trusts and Trustees—Commissions—Agreements—Courts.* Where the deed in trust specifies the compensation to be paid the trustee as a certain per cent of the "proceeds" of the sale of lands made in executing the power thereof, and there is no allegation of fraud, undue influence or usury, the agreement of the parties will control, and the courts will not interfere, or reduce the amount of the trustee's compensation as specified in the deed; and by the word "proceeds," upon which the percentage as commissions is calculated, is meant the amount the lands sold for. *Loftis v. Duckworth*, 146 N. C., 344, cited and distinguished. *Banking Co. v. Leach*, 706.

17. *Mortgages — Trusts and Trustees — Sales — Advertisement — Costs — "Thirty Days"—Statutes.*—Where a mortgage of land provides that notice of the sale under the power thereof given in the conveyance shall be published in a newspaper, etc., "for a time not less than thirty days prior to the date of sale," and the language employed closely follows the provision of Revisal, section 641, it is *Held*, that by the agreement entered into by the parties the advertisement should be inserted in the newspaper once a week for four consecutive weeks, and not consecutively for thirty days, and an allowance made in the Superior Court for an advertisement for thirty consecutive days was erroneous. *Ibid.*

TRUSTS—*Continued.*

18. *Mortgages—Trusts and Trustees—Attorney's Fees.*—Where a trustee has fully executed his trust except the payment of the proceeds of a sale of lands made in pursuance thereof to the parties entitled, and the funds are atttached in his hands by a claimant thereof, he is not interested in the result of the action except to hold the trust funds until the matter is determined and to state the amount thereof; and there being no necessity for him to employ an attorney, no attorney's fees are allowable to him when he has employed one. *Ibid.*

ULTRA VIRES. See Arbitration and Award, 3.

UNDUE INFLUENCE. See Wills, 8; Deeds, 26, 27.

VACANT AND UNAPPROPRIATED LANDS. See Public Lands.

VARIANCE. See Indictment, 3, 4; Pleadings, 8.

VENDOR AND PURCHASER. See Contracts, 1; Judgments, 3; Evidence, 10; Trials, 16.

1. *Evidence—Vendor and Purchaser—Fruits—Heated Cars.*—In an action to recover the contract price for a car-load shipment of bananas, where the defense is that the plaintiff had failed to perform his contract by not properly loading the fruit and ventilating it in the car, so that it arrived overripe, and not in a merchantable condition, testimony of the defendant's witness familiar with the trade and the packing and shipment of bananas, that it was not customary to give bananas heat in the car, is competent to controvert the plaintiff's evidence that the bananas had been properly loaded in a heated car. *Fruit Distributors v. Foster*, 39.

2. *Evidence—Vendor and Purchaser—Fruits—Car-load Shipments—Messenger—Appeal and Error—Harmless Error.*—Where the defendants resist payment for a car-load shipment of bananas on the ground of improper loading and their receipt in worthless condition, exceptions to testimony of the defendant relating to the duty of a messenger accompanying the shipment becomes immaterial when it appears that no one accompanied the shipment in question. *Ibid.*

3. *Vendor and Purchaser—Car-load Shipments—Fruit—Preparation for Shipment.*—It is the duty of the seller to properly prepare a car-load shipment of merchandise (bananas in this action), and should the shipment arrive to the consignee in a damaged condition for his failure to have done so, he is liable for the proximate damages. *Ibid.*

4. *Vendor and Purchaser—Contracts—Warranty Implied—Merchantable.*—The law will imply a warranty in the sale of goods that they are at least merchantable or capable of some use for the intended purpose; and where, in the sale of a second-hand hearse, neither of the parties having seen it, the seller expressly states that he will not warrant its "condition," owing to the difference in opinion of the value of such things, but that it will be shipped to the buyer ready for use, etc., it will not affect the implied warranty that the hearse can at least be used as such and that it is not worthless, for the provisions stated by the seller only relate to a warranty of the quality of the article sold, which the law itself excludes in the absence of contractual provision therefor. *Furniture Co. v. Manufacturing Co.*, 41.

VENDOR AND PURCHASER—*Continued.*

5. *Same—Entire Contract—Correspondence—Warranty of Quality—Merchantable—Interpretation.*—In correspondence leading up to and included in a contract of sale of a hearse, the purchaser wrote the seller that he was in need of a good second-hand hearse, to which the seller replied that he had one at a certain place which he would ship on receiving remittance therefor in a certain sum, and upon receiving the remittance, he held the check and wrote the purchaser that, to avoid misunderstanding, he desired to say he would not guarantee any second-hand vehicles, etc. Upon its arrival the purchaser found it to be worthless. Neither of the parties had seen the hearse up to that time. *Held*, the purchaser may recover upon the implied warranty that the hearse could at least be used as such, but not as to the quality; and the entire contract is not inconsistent with this construction, or as striking out the express provision that vehicles of this kind were not guaranteed by the seller. *Ibid.*

6. *Vendor and Vendee—Defeasible Purchase—Mortgages—Mortgagor's Possession—Limitation of Action.*—Where one has taken the title, possession, and use of lands upon the agreement that if the profits are sufficient to pay off a certain debt owed to him within a reasonable time he will make a reconveyance of the lands to the borrower, the transaction is in the nature of a defeasible purchase; but if construed as a mortgage in this case, *semble*, the lender's possession thereunder for ten years will bar the borrower's right of action as mortgagor. *Coxe v. Carson*, 132.

7. *Vendor and Purchaser—Contracts—Parol Evidence—Warranty Implied.*—Where the written contract, signed by the purchaser, specifies that a cap sold for fruit jars will fit any "Mason jar," and that the terms of the contract shall not be varied by any promise or agreement not specified in the written order, a representation made by the sales agent, to the purchaser, at the time of a demonstration by him of its truth, and as an inducement to buy, that the cap sold would fit all of the Mason jars in his store, does not violate this special stipulation. *Pickrell v. Wholesale Co.*, 381.

8. *Vendor and Purchaser—Sale by Sample—Implied Warranty—Breach—Evidence.*—While a warranty of goods which are sold in bulk by sample implies only that the bulk will come up to the sample, when the seller adopts the sample as his own description of the bulk, upon which the purchase is made, this rule does not apply when the sample is only used by the seller to demonstrate that his wares will accomplish a certain purpose, which he warrants them to do; for then it is open to the purchaser to show that the wares were not as represented, though the bulk corresponds in kind and quality with the sample, it being more than a sale by sample. *Ibid.*

9. *Same—Demonstration by Sample.*—Where a certain kind of cap for sealing fruit jars is sold under a written and signed order, with the warranty that they will fit any "Mason jars," and the vendor's salesman has guaranteed that they would fit any Mason jars in the purchaser's store, and actually fitted several of the caps to the jars to prove that they would do so, it is competent for the purchaser to show that he had, at the time, a quantity of Ball-Mason jars which the cap would not fit or properly seal; and upon conflicting evidence the issue should be submitted to the jury, there being evidence that the caps would not fit all Mason jars, as warranted. *Ibid.*

VENDOR AND PURCHASER—*Continued.*

10. *Contracts—Vendor and Purchaser—Warranty—Principal and Agent.*—A written contract of sale of a thresher and engine, containing the warranty that they are well made, of good material, and durable with proper care, and that representations made by any one as an inducement of purchase will not be binding upon the vendor, does not by its terms or implication extend the warranty to include that the engine will successfully operate plows; and any verbal representations made by the seller's agent at the time, or thereafter, without the ratification of the principal, are incompetent as evidence. *Bland v. Harvester Co.*, 418.

11. *Vendor and Purchaser—Goods Sold—Verified Account—Evidence—Interpretation of Statutes.*—Revisal, section 1625, enacting that in actions for "goods sold and delivered, a verified itemized statement of such account shall be received in evidence, and shall be deemed *prima facie* evidence of its correctness," clearly imports by its express terms that it is confined to "goods sold and delivered"; and it was designed to facilitate the collection of such accounts where there was no *bona fide* dispute and to relieve the plaintiff in such instances of the expense and delay of formally taking depositions; and the terms of the statute are strictly construed. *Nall v. Kelly*, 717.

12. *Same—Witnesses.*—An affiant who verifies an account of goods sold and delivered, which is to be received in evidence and taken as *prima facie* evidence of its correctness, under the provisions of the Revisal, section 1625, and cognate sections, shall be regarded and dealt with as a witness *pro tanto*, and to such extent must meet the requirements and is subject to the qualifications and restrictions as to other witnesses; and when it appears on the face of the account or affidavit that the affiant has no personal knowledge of the transaction, or has sworn to the matters stated in his affidavit on information and belief, he being incompetent to testify thereto as a witness, the affidavit does not come within the intent and meaning of the statute. *Ibid.*

13. *Same—Transactions with Deceased—Evidence.*—A verified itemized statement of an account made by the seller of goods, sought to be introduced and received as *prima facie* evidence of the sale and delivery thereof as therein stated, under the provisions of Revisal, section 1625, is construed to be in subordination to the provisions of the Revisal, section 1631, when it is shown that the purchaser, at the time of making the affidavit, was a lunatic, etc.; and should the affiant swear to the matters of account as within his own knowledge, his verification or affidavit, as stated, is ineffectual, being the testimony of a party interested in the transaction or communication sworn to. The principles held with reference to Revisal, sections 1622, 1623, commonly known as the Book Debt Law, discussed and distinguished. *Ibid.*

14. *Vendor and Purchaser—Verified Accounts—Trials—Evidence—Nonsuit.*—Where a verified account or affidavit to a statement for goods sold and delivered is insufficient to establish a *prima facie* case, under the provisions of Revisal, section 1625, and this is the only evidence offered, a judgment of nonsuit upon the evidence is properly allowed. *Ibid.*

VENDOR'S LIEN. See Logs and Logging, 2.

VERDICT SET ASIDE. See Courts, 11, 12, 13.

VESTED RIGHTS. See Courts, 9; Statutes, 2.

VICE PRINCIPAL. See Master and Servant, 22, 23.

WAIVER. See Appeal and Error, 48; Arbitration and Award, 1; Bills and Notes, 7; Insurance, 5.

WARRANTY. See Trials, 16; Vendor and Purchaser, 4, 7, 8, 10; Contracts, 12, 13; Deeds, 30, 32.

WATER AND WATER-COURSES. See Drainage Districts, 1, 6; Statutes, 4.

WHARVES. See Deeds, 31, 32.

WILLS. See Trials, 15; Estates, 1.

1. *Wills—Interpretation—Life Estates—Remainders.*—A will should be so construed as to effectuate the intention of the testator; and where a devise of lands is made in fee and thereafter it appears by construction of a later portion of the will that the testator only intended to devise a life estate with limitations over, that interpretation which accords with the testator's intent will be given to the instrument. *Shuford v. Brady*, 224.

2. *Same—Contingent Remainders—Defeasible Estates.*—A devise of lands to a minor child, with a certain contingent limitation over in case of his death before majority, and, further, that should the devisee live and marry and have children, at his death the property shall go to his eldest living child; but should he die leaving no children, then to his wife; and it appears that the devisee has become of full age, has been married for ten years without children, it is *Held*, the limitation over to the wife constitutes a remainder in fee, defeasible upon the birth of children from the marriage; and the law presuming that children may be born of a marriage relation as long as it exists, an agreement of record "that there is no probability that any will be born" will be disregarded. *Ibid.*

3. *Wills—Contingent Remainders—Estoppel.*—Under a devise of land to a son of the testator for life, then to his wife, with further contingent limitation over to the children of their marriage, upon the birth of such child or children they take directly under the will, and cannot be estopped by the deed of their parents. *Ibid.*

4. *Wills—Devisees—Life Estates—Rule in Shelley's Case.*—A devise of lands to the testator's wife for life, with provision, "after the expiration of the life estate . . . I give, devise, and bequeath all of my estate, real and personal, to my heirs at law, and the heirs at law of" the wife, "to be equally divided between them, share and share alike": *Held*, no estate of inheritance passed to the wife, and there was a failure of title as to one-half of the land, and the rule in *Shelley's case* does not apply. *Haar v. Schloss*, 228.

5. *Wills—Interpretation—Estates—Contingent Devises.*—A devise to the testator's sister for life, then to his nieces, P. and M., with provision that should either of his said nieces die leaving no child or representative thereof, the one-half interest of such should go to the other; but should both nieces die without child or representative of such, then the property devised to them shall go to certain named nephews: *Held*, the life tenant having died, the nieces took, respectively,

WILLS—*Continued.*

an estate in fee in one undivided half of the property, defeasible as to each upon her dying without child or representative thereof, and in case either die without such representative, her share would go to the survivor in fee, the entire estate being then a fee defeasible in case of such survivor's death without child or descendant, and passing, in that event, to the nephews named as ultimate devisees; and should some of these last have died without children, then to the survivors. *Hobgood v. Hobgood*, 485.

6. *Same—Children—Designation of Estate.*—An estate for life, then to P. and M., but should either die without child or children, then to certain ultimate devisees: *Held*, the children of P. and M. are not given directly any estate or interest in the lands, their existence being only referred to as the determining event in the defeasible estates taken by their parents, and they may take only such as may come to them by descent. *Ibid.*

7. *Wills — Mental Capacity — Trials — Instructions.*—The rule as to the mental capacity requisite for a testator to make a valid disposition of his property by will is sufficiently given when the court charges the jury that they must find that the testator knew at the time the nature and effect of his act, and that he was making a will disposing of his property and to whom, and the relationship of the beneficiaries to himself. The early and the more modern rule discussed by WALKER, J. *In re Craven*, 561.

8. *Wills—Mental Capacity — Undue Influence — Evidence.*—Mental weakness of the testator from old age, at the time of his making a will, or after his mind has lost a portion of its former vigor and has become weakened by age, disease or otherwise, compatible with sufficient mental capacity to execute a valid will, provided he understands all that he is about, and choses rationally between one disposition of his property and another, and is able to retain the facts in his mind long enough to dictate or write out his wishes, and to execute the will with the essential formalities. *Ibid.*

9. *Same—Parent and Child—Kindness—Persuasion.*—Acts of kindness or consideration shown by a child to an aged or sick parent do not, of themselves, show such undue influence upon the latter as will affect the validity of his will disposing of his property in favor of this child; nor will mere persuasion have this effect, where the testator has not been prevented from exercising his free volition; for such acts, to have the effect stated, must amount to such domination by the stronger over the weaker mind as to amount to the substitution of the will of the former for that of the latter, resulting in an unfair advantage over others entitled to the testator's favor, and who would naturally receive it, but for the intervention of this designing and controlling influence. *Ibid.*

10. *Wills—Cancellation in Part—Lapsed Legacies—Residuary Clause—Interpretation of Statutes.*—A will may partially be revoked in its material parts by canceling, tearing, etc.; and where the testator has named several beneficiaries in a residuary clause, and it appears upon the face of the will that several of these names have been run through with a pen, and the intention of the testator to revoke has been established, the beneficiaries whose names have been thus erased take nothing, and the whole estate, under the residuary clause, goes to the

WILLS—*Continued.*

others therein named, together with such legacies as may have lapsed. Revisal, sec. 3142. *Barfield v. Carr*, 574.

11. *Wills—Cancellation in Part — Evidence — Declarations.*—Where it appears upon the face of a will that the names of certain beneficiaries in the residuary clause have been stricken out by pen, evidence of declarations of the testator made since the execution of the will, that he meant to strike the parties from the will, and that the witness was to see that they did not share in his estate, are competent. *Ibid.*

12. *Wills—Cancellation in Part—Trials—Burden of Proof.*—In an action brought to interpret a will and declare it canceled in part as to certain beneficiaries whose names thereon appear to be marked out by pen, the burden of proof is on the plaintiffs. *Ibid.*

13. *Wills—Interpretation—Corporations—Large Dividends — Time Certificates—Income—Stock Dividends.*—A devise for life of all revenue from certain corporate stock includes such dividends as may be declared after the death of the testator, though unusually large, and earned by the corporation for a long period of time antedating his death; and where the shareholders are given the privilege of taking the dividend in new stock or a time certificate of deposit, and the executor of the deceased has chosen and received the time certificate, this certificate is regarded as a dividend upon the stock, which goes to the life tenant as income therefrom. *Humphrey v. Lang*, 601.

14. *Wills—Contingent Interests—Sales—Deeds and Conveyances—Estoppel—Reformation—Pleadings—Demurrer.*—A devise of a one-half interest in lands to W. for life, then to his wife unless she should remarry, and in that case to B. for life and to his fourth generation, B. having a conveyance from the heirs and devisees of the testator other than W., to their interests in the land, executed a fee-simple deed to W., and after the death of W. and the remarriage of his wife, brought suit to recover the lands. *Held*, the contingent interests were subjects of sale and passed by the deed executed by B., the plaintiff, to W., which estops him from claiming such interests when there is no averment that his deed should be reformed for mistake or fraud; and where the complaint alleges the facts, as stated, a demurrer thereto should be sustained. *Scott v. Henderson*, 660.

WITNESSES. See Evidence, 3, 9; Vendor and Purchaser, 12; Appeal and Error, 5, 22; Trials, 4.

Evidence — Witnesses — Examination — Impeachment.—A party may not impeach his own witness by examination, though he may contradict his evidence by the testimony of another witness. *Lynch v. Veneer Co.*, 169.

X-RAY. See Evidence, 12.

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